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E S S A Y S
UPON
SEVERAL SUBJECTS
CONCERNING
BRITISH Antiquities;
V I Z.

- I. INTRODUCTION of the FEUDAL LAW
INTO *SCOTLAND*.
II. CONSTITUTION OF PARLIAMENT.
III. HONOUR. DIGNITY.
IV. SUCCESSION OR DESCENT.
With an APPENDIX upon *Hereditary and*
Indefeasible RIGHT.

Composed anno M.DCC.XLV.

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Pater-noster Row.
MDCCXLIX.

ESSAYS

UPON

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BRITISH ANTIQUITIES;

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I. Introduction of the Feudal Law
into Scotland.

II. Constitution of Parliament.

III. Honour, Dignity.

IV. Succession of Descents.

With an APPENDIX upon the
Indisputable Right.



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MDCCLXXII.

INTRODUCTION.

TO our late Troubles the Publick is indebted for the following Papers, if they are of Value to create a Debt. After many disconsolate Hours, the Author took Courage to apply himself to some Study, which might divert him from brooding over the Distresses of his Country. One Subject led to another, till a Sort of Work grew under his Hand. His only View at first was private Amusement, nor at present does he esteem the Thing of Value to be made publick for its own Sake. But he confesses, he has at Heart to raise a Spirit in his Countrymen, of searching into their Antiquities, those especially which regard the Law and the Constitution; being seriously convinced, that nothing will more contribute than this Study, to eradicate a Set of Opinions, which, by Intervals, have disquieted this Island for a Century and an Half. If these Papers have the Effect intended, it is well: If not, they may at least serve to bear Testimony of some Degree of Firmness in the Author, who, amidst

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amidst the Calamities of a Civil War, gave not over his Country for lost ; but trusting to a good Cause, and to good Dispositions in the Bulk of his Countrymen, was able to compose his Mind to Study, and to deal in Speculations, which are not relished, but in Times of the greatest Tranquillity.

Edinburgh
10th Nov. 1746.

HENRY HOME.

ESSAY I.

*Of the Introduction of the FEUDAL LAW
into SCOTLAND.*

THE Introduction of the Feudal Law into Scotland is an Event, which makes not such a Figure in our History as it ought to do: It is mentioned indeed by most of our Historians, but dryly and cursorily, as if it were an ordinary Incident. And yet, as the Story is told, it appears to be a very singular Revolution, for which no adequate Cause is assigned. If Credit can be given to History or Tradition, we were once a free People; nay, we are reported to have been fierce and untamed, our Nobles of great Power, and generally too mighty for the Sovereign. Now, as it is the Plan of the Feudal Law, to bestow the whole Land Property upon the King, and to subject the Bulk of the People to him in quality of Servants and Vassals; a Constitution so contradictory to all the Principles which govern Mankind can ne-

ver be brought about, one should imagine, without Violence; whether Conquest from without, or military Force from within; Yet neither of these Causes is assigned by our Authors, nor will the History of Scotland admit of such Suppositions; for no Period can be assigned, during which the Feudal Law might have been introduced, where there are any Traces of Conquest, or of military Power, sufficient to inforce so unnatural a Constitution.

ALL our Historians are agreed, that this Revolution happened in the Reign of *Malcolm II.* and they are also pretty much agreed upon the Circumstances which brought it about. This King had been engaged in fierce Wars with the *Danes*, which, after various Fortune, ended in driving the Invaders out of this Part of the Island. Many of his Nobles had done him notable Service; and, to reward their Fidelity, ('tis said) he divided all the Crown Lands amongst them. And so circumstantiate is the Story, that 'tis averred he retained no Lands to himself, but the

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Mute-bill in the Town of *Scoon*. A very extensive and unprecedented Piece of Liberality. But what follows is still more difficult to be believed; That the Lords, to testify their Gratitude, gave and granted to their Sovereign, and to his Heirs for ever, the Ward and Relief of their Lands with the Marriage of their Heirs. This is a short Way of expressing a thing, which bears this obvious Meaning, that all the Lands in *Scotland* were surrendered to the King as his Property; that all the great Men came under personal Obligations to be his Servants and Vassals, holding only the Possession of the Lands which they had surrendered, for Sustenance of themselves and their People, ready upon all Occasions to fight his Battles. There are few Examples of so warm Returns of Gratitude among Individuals; but, in a whole Nation, altogether incredible. I should be shock'd with such Liberty of Fiction in a Romance. Therefore laying aside this Account of the Matter, as utterly improbable, the Design of this Essay is to bring together some Circumstances,

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whence probable Conjectures may be formed, at what Time, and after what Manner, the Feudal Law was introduced into *Scotland*. I shall first endeavour to settle the Time of Introduction, as it may give Light to the other Branch of the Disquisition; and I must confess, that, notwithstanding the concurring Testimonies of all our Historians, I entertain some Doubts whether the Feudal Law was introduced into *Scotland* so early as in the Reign of *Malcolm II.* What to me brought this Matter first under Suspicion, is a Fact that can be made extremely evident. When one dives into the Antiquities of *Scotland* and *England*, it will appear that we borrowed all our Laws and Customs from the *English*. No sooner is a Statute enacted in *England*, but, upon the first Opportunity, it is introduced into *Scotland*; so that our oldest Statutes are mere Copies of theirs. Let the *Magna Charta* be put into the Hands of any *Scotchman*, without giving its History, and he will have no Doubt that he is reading a Collection of *Scotch* Statutes or Regulations. Now it is a Point settled
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among the best *English* Antiquaries, That the Feudal Law was introduced into *England* by *William* the Conqueror. I need not spend Time upon this Topick, after what is said by the accurate *Spelman*, and by our Countryman *Craig*. Joining these two things together, a strong Presumption arises, that the Feudal Law made its Progress from *England* to this Country, as all the *English* Statutes, making Improvements and Alterations upon it, certainly did. But this Presumption receives additional Force, when it is considered, that if we had the Feudal Law before it came into *England*, it must have been taken from some other People than the *Normans*, with whom we had no Intercourse. Upon that Supposition, we must expect to find the Feudal Customs in *Scotland*, after the Days of *William* the Conqueror, somewhat different from what they were in *England*, as the Feudal Customs were very different in different Nations. What we had in *Scotland* must have been formed upon the Plan of those of the Country from which we borrowed them,
perhaps

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perhaps a little varied in our Practice. Yet, upon Inquiry, we find no such Disparity as we ought to expect from the Supposition. On the contrary, I think it may with Assurance be pronounced, that the Feudal Customs in *England* and *Scotland* were precisely the same, for a Century or two after the Days of *William* the Conqueror. This Congruity betwixt the Laws of the different Countries affords Evidence, as high as Probability can go, either that we borrowed the Feudal Law from *England*, or, that they borrowed it from us. The latter is not maintained by any Author, nor is there any Foundation for the Assertion, it being as well vouched as any Point can be, of that Antiquity, that *William* the Conqueror brought the Feudal Customs along with him from *Normandy*: And it is certain, he had no Intercourse with *Scotland*, unless in the Shape of Enmity and War.

In fair Reasoning it must be yielded, that the Circumstance now mentioned ought to create a Suspicion, that the Feudal Law is not

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of such Antiquity in *Scotland* as is generally believed. But it will be said, that Doubts and Suspicions, however great, must yield to positive Evidence; and that we have not only the Authority of all our Historians for the Fact above mentioned, but still a more convincing Evidence, the Laws of *Malcolm II.* still extant, which bear, "That King *Mal-*
" *colm* distributed all his Lands in *Scotland*
" among his Men; reserving nothing in Pro-
" perty to himself, but the Royal Dignity,
" and the *Mute-bill* in the Town of *Scoon*.
" And all his Barons gave and granted to him
" the Ward and Relief of the Heir of ilk
" Baron, for the King's Sustainment."

THESE Authorities appear to be of Weight, and shall be handled deliberately. Supposing the above mentioned Laws to be those of *Malcolm II.* the Dispute is at an End, and the Evidence complete, not only upon account of the above cited Passage, but because in these Laws frequent mention is made of Feudal Customs, such as the Office of Chancery, Charters,

Charters, Safines, Barons holding of the King, Knights holding of Barons, and others holding of Knights, &c. But when I weigh this Evidence of the Antiquity of the Feudal Law in *Scotland*, I perceive one Circumstance wanting to make it complete. That these are the Laws of King *Malcolm* cannot be denied ; they have in all Ages been reckoned authentic, and King *Malcolm* is mentioned in the Body of the Work : But it may be controverted, whether these are the Laws of *Malcolm* the II. We had four Kings of the Name of *Malcolm* ; and we have no Authority, but from the Title, to ascribe these Laws to the second of that Name : But at what Time, or upon what Evidence this Title was added, we are altogether uncertain. The Title in the printed Copy is obviously a *post facto* Work ; for it runs thus : “ The Laws
 “ of King *Malcolm Mackenneth*, second of
 “ that Name, who was Son to *Kenneth* the
 “ Third, and began to reign in the Year of
 “ the Creation of the World 4974, and of
 “ Christ 1004. These Laws are authentic,
 “ &c.”

"&c." This Title proves only, that *Skeen* the Publisher believed these to be *Malcolm* the II.'s Laws: Upon what Evidence he does not say, nor can it well be gathered, if it be not what arises from the Title given to the Manuscript Copies, which in all Probability had no better Foundation than a vague Tradition.

BUT I chuse not to rest upon negative Arguments. There is Evidence the most convincing, that *Malcolm* the II. was not the Author of these Laws: This Evidence is drawn from the Work itself, wherein frequent mention is made of Earls and Barons, of the Chancellor and his Court, Coroner, &c. none of which Names, in all Probability, had a Being in the Time of *Malcolm* II. The Court of Chancery was not known in *England* before *William* the Conqueror; and it is not probable we had it before his Time. But more positively, 'tis a Fact agreed upon by all Writers, that it was *Malcolm* III. who created the first Barons and Earls. *Dempster*.

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the best of our Antiquarians, p. 120, *Malcolmus tertius, sublato Maccabæo tyranno, regnum legitime sibi debitum occupavit, quod ut ornaret unica cura incubuit: tunc et a prædiis nobilibus nomina quisque sumpsit, et cum magna frequensque nobilitas S. Margaretam ex Hungaria et Anglia secuta in Scotia confedisset, splendorem novo suo principatui additurus, Barones et Comites creavit.* Before the Days of *Malcolm III.* *Thane* was the only Name in *Scotland* by which the Nobles were distinguished. Turn over the Historians, and there will not be found anywhere mention of the Title of Baron before his Time, nor of Earl. All were called *Thanes*, such as the Thane of *Fife* in *MacBeath's* Time, Thane of *Ross*, Thane of *Sutherland*, Thane of *Caithness*, &c. but from *Malcolm Canmore's* Time downwards, not a Word of Thane; all the great Lords are either Earls or Barons. Here then the Evidence is compleat, that these Laws are not of a more ancient Standing than the Reign of *Malcolm Canmore*, and to him therefore they must be restored: For

they are the Laws of one King *Malcolm*, and 'tis more probable they are his, than the Laws of his great Grandson *Malcolm* IV. before whose Time the Feudal Law was certainly introduced into *Scotland*.

HAVING discussed this Point, the Argument drawn from the Authority of the Historians will be easily got over. We have no Author who wrote in the Days of *Malcolm Canmore*, nor for many Ages after: Therefore, as our Histories rest upon no better Authority than Tradition, 'tis not surprising, that an Event which happened in the Reign of one King, should be ascribed to a Predecessor of the same Name, there being a prevailing Bias in most Nations to carry back their Antiquities as far as possible. But the Matter does not rest here, the Error of these Historians may be detected from their own Writings. *Hector Boece*, for Example, who ascribes the Introduction of the Feudal Law, as aforesaid, to *Malcolm* II. adds with the same Breath, that it was *Malcolm* II. who divided

Scotland into Baronies. We have therefore this Author's Testimony, that the same *Malcolm* introduced the Feudal Law, who divided *Scotland* into Baronies. This was certainly *Malcolm III.* And *Bucbanan*, tho' for the most Part he implicitly follows *Hector Boece*, yet, in telling the above Story, expresses a Doubt, and inclines to think, that we had the Laws of Ward and Relief rather from the *English* and *Normans*.

THAT I may leave nothing untouch'd, which concerns a Point of such Importance in the Antiquities of this Country, I proceed to some other Considerations, which I perceive may be made Use of to support the high Antiquity of the Feudal Law in *Scotland*. One is made Use of by the learned *Craig* to that very End, *Multa tamen sunt quæ me movent, ut hoc jure (sciz. feudali) nostrates usos putem, antequam Angli eo uti cæperint. Hoc enim certissimum est, nos purius hoc jus habere quam vicinos; ut in rivulis aquarum qui quæ propiores sint fonti sive scaturigini eo sunt puriores.*

riores. This Author probably had in view the Feudal Customs, as they subsisted in his own Time; and 'tis very true, that in *England* the Feudal Law began sooner to decline than it did in *Scotland*. Arts and Industry flourished in that Kingdom long before they had any Life here; and I have observed elsewhere, that the strict Regulations of the Feudal Law, are in a great Measure inconsistent with the Arts of Peace. But if *Craig* had under Consideration the Feudal Law, as practised in this Island for some Ages after the Time of *William* the Conqueror, he is undoubtedly in a Mistake. The Feudal Law, during that Period, was precisely the same in both Kingdoms, so far as we can gather, by comparing the ancient Statutes and Law-books of *England* and *Scotland*.

THE *Regiam Majestatem*, the oldest Institute we have of our Laws, is generally believed to have been compiled in the Reign, and by the Authority of *David* the I. And, as it contains a full and accurate System of
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our Feudal Customs, a probable Argument may be suggested from it, that the Feudal Law had a Beginning in *Scotland* before the Days of *Malcolm Canmore*. For, if the Feudal Law was introduced by that King, there is no Probability it should make so sudden a Progress, as to be ripe for a regular Institute in the Days of his Son *David*. This is not agreeable to the natural Course of things, and therefore not readily to be credited. Law is but of slow Growth, especially among a rude People, more addicted to the Arts of War than of Peace. And yet, whatever be the Era of the *Regiam Majestatem*, it appears from it, that the Feudal Law was brought to a considerable Degree of Perfection in *Scotland* at that Time. The Argument is weighty; and we must either give the Feudal Law a more early Date in *Scotland* than the Reign of *Malcolm Canmore*, or the *Regiam Majestatem* a later Date than the Reign of *David I*. With regard to this Matter one thing is certain, that the *Regiam Majestatem* was compiled in the Reign of one of our *David*s. The Author,

thor, whoever he be, declares in his Preface,
 " That he was commanded by King *David*
 " to compile this Work, with the Counsel
 " and Advice of the whole Realm, that all
 " the Inhabitants thereof might learn and
 " have Knowledge of the same." What re-
 mains is to determine which of the *David*s
 this was. If the Reader will indulge a short
 Digression, I shall make it evident, that it
 was *David* the II. who reigned two Cen-
 turies later than the other, the Distance of
 whose Reign from that of *Malcolm Canmore*
 affords sufficient Time for the Ripening of
 the Feudal Law. All the World knows,
 that the *Roman* Law, after being buried in
 Oblivion for Ages, came to be restored in
Italy by an Accident. The very Books of
 that Law were understood to be lost past
 Recovery, till a Copy of the Pandects was
 found in the Town of *Amalphi* anno 1127.
 by *Lotharius* the Emperor, when he took
 that Town, in the War he carried on against
Rodger King of *Sicily* and *Naples*. The
 Knowledge of it increased so fast, that it was
 taught

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taught publickly by *Vaccarius* at *Oxford* about the Year 1150, during the Reign of King *Stephen*. This was as swift a Progress as any Science can be supposed to make; and therefore no Probability we had it in *Scotland* before that Time, nor consequently in the Reign of *David* the I. who died in the Year 1153. These Facts will give Light to the Subject in hand. The Author of the *Regiam Majestatem* appears to be well acquainted with the Civil Law, and frequently appeals to it as to known Law. See *lib. 2. c. 16. § 2.* The *Regiam Majestatem* therefore, compiled when the Knowledge of the Civil Law was spread through *Scotland*, could not have a Being in the Days of *David* I. and consequently the Argument is conclusive, that it was compiled in the Days of *David* II.

Thus I have endeavoured to make out, that the above remarkable Revolution in our Land Rights happened in the Reign of *Malcolm Canmore*. And it must afford an additional Degree of Conviction, that were one reduced

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to a Conjecture, the said Reign would be pitched upon before any other, for the Introduction of the Feudal Law. This Law was brought into *England* by a Conqueror, at least one who treated his new Subjects as a conquered People. It is evident, that the possessing of Land by Tenure, throws great Weight into the Scale of Royalty; and therefore, it will not be surprising, that a neighbouring Prince who understood his own Interest, should endeavour to copy after so good an Example. At the same time, there never was in the Reign of any of our Kings, such a Conflux of Strangers into *Scotland*, as in the Days of *Malcolm Canmore*; *English* especially, some of the highest Rank. By them the Fashion was begun of Surnames, many of which remain at this Day with our most illustrious Families. 'Twas to keep Pace with *England* that the new Titles of Earls and Barons were introduced; and we may readily believe, that a politic King, who understood the Arts of Government, would not stop short, but endeavour also to introduce the Feudal Law, which

he saw would tend greatly to increase his Power and Authority. And the Conviction founded upon these Circumstances turns stronger and stronger, when we consider, that the Practice of giving Charters of Lands, is by our Antiquarians universally ascribed to *Malcolm Canmore*. Many of our old Families pretend to have had Charters from that King, but none before his Time. Now, supposing the Feudal Law to have been as old in *Scotland* as *Malcolm II.* 'tis scarce supposable Charters would be of a later Date, as such Writs seem to be necessarily connected with Feudal Grants.

AND this leads to the second Branch of the Enquiry, by what Means, and after what Manner were the Nobles prevailed upon, not only to part with their Lands, but to subject themselves personally to Feudal Service? However the Thing might be at first disguised, the total Surrender of Lands to the King during the Minority of an Heir, and the Year's Rent payable at the Entry of every Heir,

were

were no slight Perquisites to be yielded rashly. The Matter is dark; and Historians have touched it so slightly, that we have few Circumstances to build Conjectures upon. And it makes the Story still more mysterious, that we have Vouchers of extravagant Donations of the Crown Lands by *David I.* in favours of the Church. I cannot easily reconcile this with the Story told, that King *Malcolm* gave away the whole Crown Lands, reserving nothing to himself but the *Mutehill* of *Scoon*. 'Tis true, there might have been Forfeitures in the Interim; and if any one is satisfied with this Solution, I have nothing to object; only the Interval betwixt the Reigns of *Malcolm Canmore* and of his Son *David I.* is, I'm afraid, too short to make this Solution be generally relished. At the same Time, King *David's* Liberality to the Church is condemned by every Writer as truly unjust, with regard to his Successors, who were thereby deprived of their Birth-right, viz. the Patrimony of the Crown: And yet the Charge is scarce well founded, if in Fact nothing was given

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away, but forfeited Lands, which every King is privileged to dispose of at his Pleasure.

I CANNOT readily bring myself to believe, that *Malcolm Canmore* gave away the whole Crown Lands, as is related. And on the other hand, I can as little bring myself to believe, that by any Means less than absolute Force, could the Bulk of the Nation be brought to submit to an Act so visibly prejudicial to them, that of surrendering their whole Lands to the King, and their Persons also, reserving only the Usufruct, in Name of Wages, for Services to be performed by them.

In a Matter so dark and intricate, I dare venture no further, than to suggest a few Conjectures. Before the Feudal Law was known in *Scotland*, I take it for granted, that our People held their Lands without Writ, and that Possession was the Circumstance which determined the Property of Lands, as at this Day it does of Moveables. Some Traces of this we have remaining in the *Orkney Islands*,
where

where the Feudal Law is scarce yet fully established. If instead of introducing the Feudal Law, all at once over the whole Kingdom, it shall be supposed, that *Malcolm Canmore* did no more but lay the Foundation of a Building, which was finished by his Successors, the Thing will be easily credited: And touching the Engines made Use of, we need not be at a Loss, for we are directed to them by our Authors. It was certainly the Crown Lands which were made Use of as the Bait to allure the Nobles. A prudent Distribution of Part of these Crown Lands, without supposing the whole to be Aliened, would go a great Way. No Person upon whom Crown Lands were bestowed, could refuse to hold them upon any Conditions the King was pleased to impose. Here was a Beginning given to the Feudal Tenure. If the Gift was considerable, the Receiver could not handsomely avoid allowing his own Estate to be ingrossed in the Charter, supposing the Thing to be demanded of him. And such Stratagems would not be overlooked by an artful Monarch, who

who had it at Heart to make the Feudal Law
 universal in his Kingdom. *Malcolm* had another Engine at hand. It
 was this King uncontrivertedly who introduced
 the Titles of Earl and Baron. Possibly
 he had a further Design in this, than merely to
 emulate the Splendour of a neighbouring Court.
 Our Forefathers were fond of Titles, and were
 delighted with Shew and Equipage. If some
 were tempted by a new Title to give up their
 Independency, and to accept of their own
 Estates as a Gift from the King, holding of
 him by military Tenure, we shall cease to
 wonder at the unequal Purchase, when we see
 so many in later Times renouncing their Inde-
 pendency, and giving themselves up as Slaves
 to a Court for Ribbands and Garters, still more
 empty Gengaws, if possible, than Titles of
 Honour.

The Foundation being thus happily laid,
 our Kings had many Opportunities to carry on
 the Work. Our Forefathers were a fierce
 and restless People; Property was in a conti-
 nual

OF THE FEUDAL LAW.

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annual Flux by Forfeitures; and 'tis probable, that the Bulk of the *Terra firma* of Scotland has, by that Means, passed through the Sovereign's Hands one time or other. This afforded ample Means of extending the Feudal Law further and further, as Care was always taken to make out Gifts of Forfeiture in the Feudal Form.

ONE other Cause there was of the Growth of the Feudal Law, which, tho' working silently and imperceptibly, had I'm persuaded a more extensive Effect than all the other Causes combined together.

MANKIND, especially in ignorant Ages, are governed by Custom and Habit. By the Growth of the Feudal Law, a Charter certainly came to be considered as the most solemn Title to Land, so as to give to Possession alone, without a Charter, but a slender Hold of the Imagination. Perhaps this had no remarkable Effect with regard to old Possessors. But singular Successors, whether Creditors or
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Purchasers, were in a different Case. People who part with their Money will not be readily satisfied with any Title that is not of the best Sort. Thus, after introducing the Commerce of Land, we may trust that Charters were multiplied exceedingly. For whatever Security a Family might have from a long continued Possession, the Notion would in time be firmly established, that there was no secure Manner of transferring Land Property but by Charter and Safine,

IN short, my Conjecture is, that the Feudal Law was not introduced all at once, as our Authors insinuate, but by Degrees. And what I have often heard, favours this Conjecture, that so late as the Reign of *James VI.* there were landed Gentlemen in *Scotland* who never had accepted of a Charter.

IF I am not deceived, this was a Measure the most politic, and of the greatest Fore-cast, that ever was contrived. It was a bold Game for the King to play away his Crown Lands for a small Consideration in hand ; but the

the Prospect was fair, as no Constitution does more firmly unite a People with their Sovereign, than that introduced by the Feudal Law, nor gives the Sovereign such an immediate Hold of the Persons and Property of his Subjects. Our Historians give us to understand, that a prevailing Desire to support the Dignity of the Crown, gave Rise to the Feudal Law in *Scotland*. I'm sorry to observe, that Instances of publick Spirit, even among Individuals, are rare in our History. But I have read of no Instance of an universal public Spirit through a whole Nation, sufficient to bring about such a Revolution; one excepted, among the *Lacedemonians*, in the Days of their King *Lycurgus* (a).

(a) Nor is the Evidence of this Piece of History altogether above Exception. *Xenophon*, who writes a Treatise upon the *Spartan* Government, has not a Word of it.

OF THE FEDERAL BUREAU OF INVESTIGATION

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ESSAY II.

CONSTITUTION *of* PARLIAMENT.

BY the Feudal Constitutions, every Superior had a Jurisdiction within his own Territory : His Vassals were obliged to attend his Courts, and it was their Province to try all Causes, Civil and Criminal, in Form of a Jury or Inquest. Such is the Constitution of our Country Courts to this Day, held at stated Times by the high Sheriff, in Name of the King ; the Crown Vassals being all of them bound to appear under a Penalty, each in the Court of the County within which his Lands are situated. The Parliament is the King's Court for the Kingdom in general, and consequently his whole Vassals within the Kingdom were bound to give their Attendance there. The Barons and Freeholders attended in this Capacity. The Bishops, Abbots and Priors attended in the same Capacity ; and if any of them held their Lands of a Subject they certainly were not bound to perform this Service.

THE Idea of a King, where the Feudal Law took Place, is not that of a chief Magistrate or Governor, but that of a Paramount Superior, having the whole Land Property of the Nation vested in him, having his Vassals attached to him by Homage and Fealty, and supported by him out of the Produce of his Lands : which makes a very strict Connection and Union betwixt them. The Idea of a Parliament, as I have said, is that of a Court where all the King's Vassals are obliged to attend for administering of Justice, and for making Regulations to bind the whole Society.

IT was one Effect of the Feudal Law to withdraw Land from Commerce. Land being allotted for the Maintenance of Servants or Vassals, ready to obey their Masters Commands in War and Peace, the Superior could not sell, because the whole Profits arising from the Subject belonged to the Vassal, and the Vassal could not sell because he was not Proprietor. This was an unnatural Constitution, which could not subsist long in peaceable Times.

Times. The Severity of the Feudal Law gave Place by Degrees to milder and more natural Regulations. Land the most desirable Acquisition came to be *in commercio*, and the Crown Vassals originally few in Number, and possessing large Territories were greatly multiplied. Purchasers were willing to hold of the King rather than of a Subject; and the King was willing to encourage this Commerce, as it lessened the Power of the great Barons. In Time the obliging so many small Vassals to an expensive Attendance in Parliament, was considered as a Grievance. In *England* this Grievance was remedied, probably in the Days of *John* or *Henry III.* for the Record of that Transaction is lost. The Remedy was introduced with us later, and we have the Record entire. By the Act 101, *Parl.* 1427, the Attendance of small Barons and Freeholders is dispensed with, provided they send to Parliament, from every Shire, two or more of their Number to represent them.

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We followed the *English* so close in all their Regulations concerning Law and Policy, that I am persuaded our Statute 1427. has been copied from some *English* Statute enacted by King *John*, or in the Beginning of the Reign of *Henry III.* which is now lost with many other Statutes of that Period. One thing is certain, that we find Knights of the Shire elected by the smaller Crown Vassals, precisely as in *Scotland*, early in the Reign of *Henry III.* But this is not all. We find by King *John's* Charter of Privileges to his *English* Subjects, Sections 17. and 18. that it was the Practice in his Days to summon to Parliament the greater Barons by Name, leaving the lesser Barons and Freeholders to be summoned by the Sheriffs edictally, or in general Terms. Here we have the lesser Barons attending personally. From the Reign of *Henry III.* downwards, the small Barons and Freeholders never did Duty in Parliament, otherwise than by sending some of their Number out of each Shire to represent them. This makes it extremely evident, that the Attendance

dance of the small Barons and Freeholders must in *England* have been dispensed with, as in *Scotland*, upon Condition of their sending Representatives. Their withdrawing from Parliament might have been overlooked; but so pointed a Regulation, as that of acting by Delegates, could never have been introduced otherways than by a Statute. The thing deserves to be attended to, because it laid the Foundation of a House of Commons, of which more fully afterwards.

WHETHER the Royal Burrows were originally constituent Members of the Parliament is a Point much debated. It is observed,
 " That the *Reddendo* of their Charters being
 " Watching and Warding only, they were
 " not bound to give Suit and Presence in any
 " of the King's Courts; that they had a Court
 " peculiar to themselves, which was the
 " Chamberlain Ayr; that *de facto* there is no
 " Instance of their ever appearing in a County Court, and consequently no Reason to
 " believe they appeared originally in Parliament;
 " ment;

ment ; and that in *England* there is no Evidence upon Record, of Burgeſſes being called to Parliament, before 49. *Henry III.* at which time Writs were directed to the Sheriffs of the ſeveral Counties, to return the Knights of the Shire and Burgeſſes ; whence 'tis conjectured, that the calling of the Burgeſſes to Parliament was a Politic of *Simon de Montfort*, who had at that Time the Power of the Kingdom in his Hands, and who called the Parliament 49. *Henry III.* in order to purge himſelf from Suſpicions ſpread abroad of his intending to uſurp the Crown." One Fact is clear, with regard to *Scotland*, that in a Preamble to *Robert Bruce's* Laws ſtill extant, the whole Orders are faithfully enumerated ; Biſhops, Abbots, Priors, Earls, Barons, and other Noblemen of the Realm, without a Word of Burgeſſes. In a Preamble to the Laws of *Robert III.* Burgeſſes are mentioned for the firſt Time ; and the Conjecture is, that many of the noble Families having been extinguished, during the Struggles we had for Liberty
againſt

against the two *Edwards of England*, King *Robert Bruce*, in order to recruit the Parliament, found it necessary to call the Royal Burrows to a Partieipation of the Government.

NOTWITHSTANDING these specious Facts and Observations, I am of Opinion, that the Royal Burrows made originally one of the Estates of Parliament. What determines me to think so, are the following Reasons : In the first Place, they are the King's immediate Vassals, and therefore bound to Attendance equally with the Barons and Prelates ; *Suit and Presence* in the Superior's Courts being a Duty essential to every Feudal Holding, unless where expressly remitted. Secondly, Attendance in Parliament, in old Times, being reckoned a Burden or Service, by no Means a Privilege, the Royal Burrows would not have obeyed a Summons from the King, unless they had been bound by their Holding. And our Kings were by no Means so absolute, as by their mere Will to intro-

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duce a Regulation of this general and important Nature. And in the *third* Place, Supposing the King's Authority great enough to oblige the Burrows to submit to this Encroachment upon their Privileges, we cannot suppose so wise and just a Prince as *Robert Bruce* would undertake such a violent Measure, not only without Necessity, but where a more natural Remedy was at hand. For if many noble Families were extinguished, their Estates surely were not, which falling to the Crown, by the Supposition, through the Failure of Heirs, were an ample Fund for increasing the Number of Crown Vassals to fill the Parliament. *Lastly*, 'Tis presumable the Commerce of Land had crept in before this Time, and that the Crown Vassals were rather more numerous than formerly. It is certain, they were so greatly multiplied the very next Century, that it was thought expedient to exempt the smaller Barons from their Attendance,

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AND in Answer to what is urged on the other Side, the *Reddendo* of Watching and Warding proves nothing ; many Services being due which are not exprest in the Charter. Witness the common Stile of Ward-holding *Reddendo servitia solita et consueta*. It has a stronger Appearance, that Royal Burrows have been all along exempted from attending the County Courts. But this Indulgence, and the having a Court peculiar to themselves, viz. the Chamberlain Court, will not infer their Exemption from Parliaments, where Laws are made binding upon the whole Kingdom ; whereas judicial Proceedings were the only Subject-matter of Chamberlain Ayrs, nothing being there transacted relating to public Policy or Government.

THO' there is no Mention of calling Burgeses to the *English* Parliament before the 49. *Henry III.* it appears to me a very lame Inference, That the Practice began at this Time, when we find the Records of preceeding Transactions so imperfect. At the same

Time, were these Records entire, and were there no Instance before that Period of a Writ directed to the Sheriff for calling Burgeffes to Parliament, it would not follow, that the Royal Burrows were no sooner assumed as a Branch of the Legislature. This must be explained. It is mentioned above, to have been the Practice in King *John's* Days, to call only the greater Barons by Name, and to leave the lesser Barons and Freeholders to be summoned by the Sheriffs edictally, or in general Terms. Probably the Representatives from Burrows were ranked with the lesser Barons, and not honoured with a personal Citation. When the Attendance of the smaller Barons came to be dispensed with, upon their sending Representatives, this Change in the Constitution introduced an Alteration in the Stile of the Writs directed to the Sheriffs. Instead of the old Form, enjoining the Sheriff to notify publicly the Holding of the Parliament, that all who were bound might attend, he was commanded specially to return two Knights of the Shire : This made it necessary

to be equally special with regard to the Representatives of the Burrows; and therefore, in the Writ, he was directed to return two Knights and two Burgeffes: This Circumstance therefore proves nothing further than that in *Henry III's* Time, the Stile of the Writ was changed and made special, instead of being conceived as formerly in general Terms. But further, the Circumstances of the Case are a strong Evidence to me, that this was not the first Time the Attendance of the Burrows in Parliament was required. Historians mention, that this Parliament was called by *Montfort*, in order to purge himself of a Suspicion, which was gaining Ground, of his aiming at the Crown. It is not said he had any particular Connection with the Burrows, to make their Presence of Use to him; and unless it were in some such View, I cannot imagine, that *Montfort* would, in these ticklish Circumstances think of making any Alteration in the Constitution. At the same Time, the plain and simple Stile of the Writ proves it to have been a common
and

and known Writ of the Law of *England*. Had any thing extraordinary been enjoined, it must have been introduced with a Preamble to support the Command; especially, as this was not a Matter of Course, but a Summons, which the Burrows were not bound to obey.

I HAVE been the fuller upon this Point, as it tends to ascertain what was the original Constitution of Parliament, and to prove that all the King's Vassals, and no other Vassals, were the constituent Members. As personal Attendance was required, there was no Place for Representatives, unless from the Burrows. It would have been an Hardship intolerable, to oblige a whole Community to personal Attendance; and therefore we may well suppose, that in all Times this Attendance has been dispensed with, upon sending a few of their Number to represent them. This was originally the only Representation, properly so called.

THUS we see how the small Crown Vassals came to be freed from attending Parliaments,

ments, both in *England* and *Scotland*. In *Scotland* these Vassals had so little Attention to the Public, that they were satisfied with their Exemption, without thinking of fulfilling the Condition by sending Representatives, 'till the Regulation was enforced by a new Law; of which afterwards. Probably in *England* the Case would have been the same, but for the peculiar Circumstances of the Times. One thing appears; that in a Parliament held by *Henry III.* anno 1258, there were but twelve Representatives from the small Barons. Yet soon thereafter Struggles betwixt the King and his great Barons drawing to a Head, there were in the Parliament 1264. no fewer than four Knights for each County. This full Representation was probably occasioned by the Anxiety of the Barons, desiring a numerous Assembly to give Weight to their Proceedings. And the Regulation having once taken Place, would readily be kept up, without any new Impulse, with the Difference only of more or fewer Representatives from each County.

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THE sending of Representatives, in place of the small Crown Vassals, was but one Step towards establishing the House of Commons of *England* in the Form it now subsists. Tho' the King's Vassals convened in Parliament, were distinguished into three Estates, the Spiritual Lords, the Temporal Lords or Barons, and the Representatives from the Royal Burrows, we must not imagine they made three different Bodies : They were all equally the King's Vassals, and composed but one Body politic, which sat and voted in one House. And this Form continued in *Scotland* so long as our Parliament subsisted, after we had Representatives from Shires as well as before. In *England*, for many Centuries, the greater Barons have made one Body, the Representatives from the Shires and Burrows another, who sit in different Houses, and debate and vote separately. At what Period this Form was established is altogether unknown, so far as I can learn ; tho' the Thing be extremely remarkable, by the Change it has made in the Constitution of the *English* Government.

ment. This only is certain, that there were two Houses of Parliament before the 1376; for, in a Parliament held that Year *Peter de la Mare* is mentioned by Historians as Speaker of the House of Commons, which is a pretty strong Evidence, that the Commons were at that Time separated from the Peers, having a President or Speaker of their own; for one Body cannot readily admit of two Presidents.

As this Division of the *English* Parliament into two Bodies, was no necessary Consequence of substituting Representatives, in place of the numerous Body of Electors, I am apt to imagine, that the Difficulty of accommodating all the Members in one Place has occasioned the Separation. Parliaments were of old ambulatory. Scarce a great Town in *England* but, one Time or other, has been honoured with a Parliament. However ill accommodated, there were no Means for a Separation, while all the Crown Vassals sat in their own Right: for they could not think of making a separate

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Body of a few Representatives from Burrows. But after Representatives were introduced, in place of the small Vassals of the Crown, a Division into two Bodies was readily practicable, by placing the Spiritual and Temporal Lords in one Room, the Representatives from the small Crown Vassals and from the Burrows in another. This Practice probably had its Beginning in Towns where no single Room was found large enough to accommodate the whole Body, and has been kept up in other Towns, where there was not the same Necessity, possibly by the Authority of the Peers, upon whom it conferred an additional Lustre. The Silence of Historians favours this Conjecture. Had this Division of the Parliament been the Result of any solemn Act, whether of the Parliament itself, or of the King and Council, such a Regulation would not readily have escaped Notice. However this be, the splitting of the *English* Parliament into two Bodies, laid the Foundation of a great Change in the Constitution. And this Event, among many, is an Instance of Revolutions which
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spring from the most accidental or transitory Circumstances, and for that Reason are extremely obscure in their Origin, however remarkable in their subsequent Appearance.

As our *James I.* was perfectly well acquainted with the *English* Constitution, by his long Residence in *England*, it appears to have been his Plan to introduce into his own Kingdom many of the Laws and Customs of that Country. What we have at present to take Notice of, are contained in the above-mentioned Statute, Act 101. Parl. 1427. 1st. exempting the small Barons and Freeholders from Attendance in Parliament, upon Condition of sending Representatives; 2^d, making these Representatives, perhaps with the Representatives from the Burrows, a separate Body, which appears from the Regulation appointing a President to be chosen, called the common Speaker of the Parliament; 3^d, enacting that the Prelates and Peers should be called to Parliament *nominatim* by special Precepts. Touching the first of these Regulati-

ons, of which mention has been made above, we don't find that the Act took Effect. The small Vassals of the Crown, who had their own more than the public Interest at Heart, laid hold of the Exemption given them, without thinking of sending Representatives, because these Representatives were to be subsisted at the Charge of their Constituents. And the Prelates and great Lords, in whom the Power of the Parliament centered after this Regulation, had no Interest to enforce it. The King indeed had an Interest, in order to balance the exorbitant Power of the Nobles; but in these rude Times this was overlooked, insomuch that a Statute was obtained in the Reign of *James II.* viz. Act 75. Parl. 1457, relieving all Freeholders from Attendance, whose yearly Rent did not amount to 20 *l.* without a Word of their being obliged to send Representatives. Matters continued upon this Footing till the Days of *James VI.* save that by the Act 78. Parl. 1503. all were exempted from Attendance whose Rent was within One Hundred Merks. The Reformation greatly

greatly increased the Power of the Nobility, as it almost extinguished the Prelates. The Abbacies were totally demolished; and but few of the Bishops frequented the Parliament. By this Means the Nobility had all in their Power: They oppress'd the Burrows, and were too strong for the King. Thus the Government became purely Aristocratical, and stood in need of some Regulation to bring it to its former Poise. Had the Act of *James I.* been followed out, in the same Manner as the like Regulation was followed out in *England*, this Evil would have been prevented: And now the only Remedy was to revive that Act. The Surprise is, that a Majority was found among the Nobility, to countenance a Regulation, which behoved remarkably to abridge their Authority. It appears from the Statute which is the 114. Parl. 1587. that great Opposition was made. The Attendance of the small Barons in Parliament was so thoroughly in disuse, that they could not now think of resuming as a Privilege, what they had so long been exempted from, considered as a Service.

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But it had all along been understood to be the Prerogative of the Crown, acknowledged in every Statute relating to the Parliament, that the King might call, by special Writ, any of his Vassals to attend the Parliament, notwithstanding of their Exemption. Probably this has been the Instrument made use of by the King's Ministers, to gain the End proposed: The Nobles would be told, that if they voted against the Regulation, the King would use his Privilege of calling to Parliament a Number of his small Vassals, sufficient to over-balance the Nobility. As this is but mere Conjecture, it is submitted to the Judgment of others. One Thing is certain, that the Act 1427. was revived, and the small Barons sent Representatives to Parliament from that Period downwards.

I HAVE mentioned above, that it was a Part of the Plan of *James I.* to divide his Parliament into two Bodies, as in *England*. This was not followed by *James VI.* for our Parliament continued one Body to the End.

It is left to conjecture, whether this was of Design, or by Accident; for our Historians are extremely defective upon our Civil Transactions. We have no Occasion to go further than to *England*, to learn what Influence it has upon the Constitution, to divide a Parliament into two Houses; and as it was a politic Age, this of *James VI*, I am apt to believe; it was not without Design, that the Parliament of this Kingdom was continued upon its old Footing. This is a curious Subject, and deserves to be attended to. It is pretty obvious, that the King's Negative against a Regulation agreed to by both Houses is not a very valuable Privilege. The Opinion of the two Houses being understood to be the Sense of the Nation, has rather too great Force to be resisted by the *Veto* of any single Man, the King not excepted. His refusing an Assent in such a Case, is virtually declaring himself against the Interests of his People. But an *English* Monarch is seldom brought under this Dilemma. If he can but get a Majority in either House on his Side, the Work is done.

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He may appear to be neuter. Thus, taking the Parliament complexly, a great Majority may be against the King, bent, we may suppose, to fetter him by new Limitations; and yet he may ward the Blow, by procuring a scrimp Majority in either House for him. This cannot happen where the Parliament makes but one Body, as in *Scotland*. So far the Advantage lyes on the King's Side, where the Parliament is composed of two Bodies. But to balance this, the same Advantage lyes on the Side of the People, where the King's Views are to enlarge his Prerogative by Authority of Parliament; for a scrimp Majority in either House, interposing a *Veto*, frustrates his Design. In a Word, a single Body gives great Opportunities of making Encroachments on either Side; whereas, supposing the Constitution to be sound and entire, it is best preserved so, by a Parliament composed of two Bodies.

So far the Scales seem to hang upon the Level. But then seldom is a Nation so united,

ed, as to think of making Encroachments upon the Prerogative Royal: Whereas the King, a single Person, has many Opportunities, and seldom wants Inclination to enlarge his Powers. King *James* and his Ministers could not but be sensible of this, and therefore a single Body was their Game. But the Contrivance lay a little deeper; and this may be discovered, by attending to one Branch of the Constitution of the Parliament, peculiar to *Scotland*. At what Time it was that the Lords of the Articles were established, is uncertain. But as the Sessions of our Parliament were generally very short, it was found necessary, when Business multiplied, to elect a certain Number out of each Estate, to prepare and digest Matters that were to be laid before the Parliament, for their Determination. This select Body was called the Lords of the Articles; and such was the established Practice, that no Business could be laid before the Parliament, but what was prepared by these Lords. This was in reality a Negative before Debate, which is of vastly greater

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Importance than the King's Negative after ; and the worst of it is, that there was no Remedy, in our Constitution, against the Partiality of the Lords of the Articles, however glaring it might be. A Body thus constituted, could not fail in Time to engross the whole Power of the Parliament. And in Fact it came to this at length, that Parliaments commonly sat but two Days. On the first Day of their Meeting, they chose the Lords of the Articles, an equal Number out of each Estate, to whom the King joined eight of his Crown Officers. These received all the Grievances or Articles that were brought to them, and formed them into Bills, or rejected them at their Pleasure. When all Matters were ready, the Parliament sat another Day, and approved or rejected the Bills that were laid before them.

SUCH was the Practice in the Year 1587, when the Act of *James I.* was revived. The King had a fair Chance to secure the Lords of the Articles for him, whether by influencing

encing their Election, or by gaining them over after they were elected. At any Rate eight Officers of State devoted to the King, must have had great Influence in so small a Body. By this Means the King was pretty secure, that nothing could be brought into Parliament without his Approbation. But even this Security was not reckoned sufficient. About this very Time, or soon after, a Scheme was laid and executed to improve upon the above Regulation. Under Pretext that the Lords of the Articles had not sufficient Time to overtake the Multiplicity of Affairs laid before them, four Persons were to be named out of each Estate, whose Province it was to meet twenty Days before the Parliament, to receive all Supplications, &c. to reject what they thought frivolous or improper, and to digest into a Book what they chose to lay before the Lords of the Articles. This was done by the Act 218, Parl. 1594. The Act may be thought defective, as no Provision is made in it for the Choice of this select Body. But this was purely an Artifice. It would

have been too barefaced to have named the King openly ; for it was the same with giving him a Negative before Debate. And yet it must have been obvious, that the Choice behoved to rest upon the King ; for a Body that was to meet before the Sitting of the Parliament, could not possibly be chosen by the Parliament. But, as if this were not fully sufficient to lodge with the Crown the Power of directing Matters that were to be brought into Parliament, it is further declared, “ to be the Privilege of the King, to bring directly into Parliament all Matters concerning himself, or common Good of the Realm.”

THIS Statute was too manifest an Encroachment upon the Liberty of the Subject to be patiently submitted to. It has for that Reason been dropt ; for I cannot otherways conceive, what Need there was for the Artifice made Use of by the Ministers of *Charles I.* in the Parliament 1633, to secure the Lords of the Articles for the Crown ; to wit, that

the Bishops should chuse eight Peers, and the Peers eight Bishops; and that the sixteen elected of the Bishops and Peers should jointly chuse eight Barons, and eight Commissioners for Burrows. With these were joined the Officers of State; and thus were the Lords of the Articles constituted, the Chancellor to be President in all their Meetings. The Artifice here is obvious. The Bishops were universally in the Interest of the Crown, as they have been at all Times; and upon all Occasions. The eight Peers elected by them were sure Cards for the Crown, supposing but eight of so numerous a Body capable of such a Bias. As the whole Bishops were for the Crown, it was indifferent which eight were chosen; and we may be certain, that none would be chosen out of the Commons, but what were for the King's Purpose, when such were the Electors. This Method we may believe was not practised by the Parliaments during the Troubles. They shewed their Dislike to such Artifices by abrogating the above mentioned Statute 1594. It was judged too

too bold a Step to revive this Statute after the Restoration. But as the Parliaments both in *England* and *Scotland*, which were called upon the Restoration, were abundantly obsequious to the King's Measures, another Scheme was ventured upon very little more disguised, which was to enact into a Law the Contrivance fallen upon in the 1633, to secure the Lords of the Articles for the Crown. This was done by the first Act, Parl. 1663. And thus by the Constitution of the *Scotch* Parliament, nothing could be brought under Deliberation but by the King's Authority, or, which is the same, by the Authority of his Creatures the Lords of the Articles, which was an absolute Bar to all Hopes of any Laws for securing the Liberty of the Subject. On the other Hand, he had a much better Prospect of carrying through Laws for his own Benefit, than he had in *England*. A Majority did his Affair, which did not always answer in the other Kingdom. For supposing, upon the Whole, a Majority for the King, yet if there was a scrimp Majority

majority in either House against him, nothing could be carried on.

For my Part, I should have thought it less criminal, in our Restoration Parliament, to have openly bestowed upon the King a Negative before Debate, than, in such an underhand artificial Manner, to betray their Constituents and Nation. This will stand as a Monument of the wicked Enterprises of Ministers, and of the Venality of our Parliaments; and long may it stand, if it do but serve as a Warning to guard us against such opprobrious Devices, if such shall ever again be contrived against us.

With Regard to the third Article of the Regulations introduced by the Statute 1427. that the Prelates and Peers should be called to Parliament by special Precepts, we must recapitulate in a few Words what has been said above, upon the *English* Form of calling a Parliament. Originally Parliaments were called by issuing Brieves out of the Chancery
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to the several Sheriffs, directing them to summon publicly, or edictally, all those who were obliged to attend the Parliament. A public Notification, probably at the Market-cross of the Shire, was thought sufficient. Over and above this general Summons, which comprehended all the Ranks equally, a Form was introduced, in the Reign of King *John*, of writing Letters to the Prelates and great Lords by Name, acquainting them of the Time and Place of holding the Parliament, and requiring their Attendance. When Representatives were introduced in place of the small Barons, the general Summons was laid aside as useless. The great Barons were called by special Letters, and the Brieves, now directed to the Sheriffs, came to be more special, ordering them to return two Knights of the Shire, and two Burgeses out of each Burgh within the Shire; which Form is continued down to this Day. In *Scotland* the small Barons, laying hold of their Exemption, without sending Representatives to Parliament, the general or edictal Citation continued

continued in Use as formerly, with this Addition only, that, besides the general Citation, Letters came to be directed to every one of the great Lords in particular. There was not the same Necessity here to alter the Form of Citation, that there was in *England*: The general Summons answered the Purpose now as well as formerly; for, not comprehending any but who were bound to give Attendance, it readily accommodated itself to the new Regulations, exempting from Attendance those whose yearly Rent was under a certain Sum. That the general and special Summons were used at the same Time, is clear from an Order of *James III.* entered in the Records of Parliament, 21st *Feb.* 1487. for dissolving the Parliament, and calling a new one. The Words are; “ We do you to wit, that our
“ Sovereign Lord, by the Advice of his
“ Council, has, for certain reasonable and
“ great Causes deserted and dissolved his Par-
“ liament, that was continued of before to
“ the 5th of *May* next to come, and has or-
“ dained a new general Parliament to be ser,

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“ and

“ and proclaimed to be holden at *Edinburgh*
 “ the 12th Day of *May* next to come, with
 “ Continuation of Days, and general Pre-
 “ cepts to pass to all Lords, Prelates, Barons,
 “ Freeholders and Commissaries, and with
 “ special Letters under his Signet, to all the
 “ Prelates and great Lords of his Realm, to
 “ shew and declare to them the Cause of the
 “ sitting of his said Parliament.”

I HAVE annexed a Copy of the Brieve
 issued out of the Chancery for an edictal Cita-
 tion, but I have not been so lucky as to find
 anywhere the Form of the special Precept
 under the Signet. Probably this Precept has
 fallen by Degrees into Disuse, and the calling
 of the Parliament been left to the edictal Ci-
 tation, comprehending all Persons who were
 bound to give Attendance. What confirms
 me in this Opinion is the Statute 1587, so
 often above mentioned, directing Commission-
 ers to be chosen for each Sherifdom, and
 their Names to be notified to the Director of
 the Chancery. The Form of calling these
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Commissioners to Parliament is exprest in the Statute, " That the said Commissioners be warned at the first, by virtue of Precepts forth of the Chancellary, or by his Highness's missive Letters: And in all Time thereafter by Precepts of the Chancellary, as shall be directed to the other Estates."

At this Period it would appear there was no other Precept in Use but that issued out of the Chancery, viz. the Brieve directed to the several Sheriffs, ordering a general or edictal Summons. And this Brieve also was afterwards laid aside, and in Place of it Parliaments were convened by the King's Proclamations.

THE Form of calling a *British* Parliament, so far as concerns *Scotland*, is appointed by particular Statutes. In order to the electing of the sixteen Peers, a Proclamation is issued under the Great Seal of *Great Britain*, commanding all the Peers of *Scotland* to assemble at such Time and Place, as is appointed in the Proclamation; then, and there to elect

the sixteen Peers : And the Proclamation must be duly published at the Market-Cross of *Edinburgh*, and in all the County Towns of *Scotland*, twenty-five Days before the Meeting for Election, 6th *Anne* 22. The like Proclamation might have sufficed for the Meeting of the Freeholders in every County, to chuse their Representatives ; but a different Form was chosen, and reasonably, being more analogous to the Practice of *England*. Brieves or Writs under the Great Seal of *Great Britain*, are directed to the several Sheriffs and Stewards, who, on Receipt thereof, must forthwith give Notice of the Time of Election of the Commissioners for Shires ; and, at the Day appointed, the Freeholders must convene at the Head-Burgh of their Shire or Stewartry, and proceed to the Election of their Commissioner. And the Clerk of the Meeting must immediately return the Name of the Person elected to the Sheriff or Stewart, who shall annex it to his Writ, and return it with the same into the Court out of which the Writ issued. By Authority of the
same

same Brieve or Writ, the Sheriff or Stewart must forthwith direct a Precept to every Royal Burgh within his Jurisdiction, commanding them furthwith to elect a Commissioner, as they used formerly to elect Commissioners to the Parliament of *Scotland*, and appointing the Commissioners to meet at the presiding Burrow of the District, upon the 30th Day after the Day of the Teste of the Writ, there to chuse their Burgefs for the Parliament. And the common Clerk of the presiding Burrow must immediately, after the Election, return the Name of the Person elected to the Sheriff or Stewart, who shall annex it to his Writ, and return it with the same, as aforesaid, 6th *Anne* 5.

By an edictal or general Summons one Benefit arises to the Subject, which has not been attended to when the Statute 1587 was made, otherways 'tis probable this Form of Summons would have been laid aside, and that of personal Citation taken up; for which there was the better Colour, that it was but following

ing out the Plan laid down by *James I.* Upon an edictal Citation, every Baron who has a Seat is intitled to appear in Parliament, because he is called. But by a personal Citation, Opportunity is given to drop out of the List any particular Baron the King is not pleased with. Attendance in Parliament is a personal Service, which cannot be performed by the Vassal, unless the Superior chuse to accept of it, and for this Reason it is not due, unless demanded. A Baron therefore, who is not called, cannot regularly take his Seat in Parliament. This Matter is well understood in *England*, where many Times the Advantage has been laid hold of, which a personal Citation gives the King. One remarkable Instance there is in a Parliament convened by *King Henry III. Anno 1255*, when a great many Lords were omitted to be summoned, who were not in the King's Interest. Nor at this Day do I know of any Remedy provided against the Evil, other than that the dangerous Tendency of such a Measure renders it unfit to be ventured on, since it could not fail

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to alarm the whole Nation, as evidently sub-
versive of the Constitution.

The PREAMBLE to the STATUTES of
Robert III.

PArliamentum Domini nostri Roberti tertii
Scotorum Regis illustrissimi, tentum apud
Sconam die lune vicefimo prima Februarii:
anno gratie millesimo, quadringentesimo, reg-
ni sui undecimo, cum continuatione dierum sub-
sequentium: summoritis et ibidem vocatis more
solito, Episcopis, Prioribus, Ducibus, Comi-
tibus, Baronibus, Libere-tenentibus et Burgen-
sibus, qui de Domino nostro Rege tenent in
capite,

FORM

*FORM of the WRITS for calling a
Parliament in Scotland.*

THE Parliaments of Scotland were of old called and convened by Brieves directed forth of the Chancery; for issuing of which Brieves, there was an Act or Ordinance made by his Majesty, with Advice of his Privy Council, for the Director's Warrant, in these Terms:

*THE King's Majesty, with Advice of his Council, has ordained an Parliament to be proclaimed, to begin in the Burgh of Edinburgh, the &c. Day of &c. for ordering, treating and concluding of such great Matters as instantly occurs concerning the King's Grace, the Well of this Realm, and the Lieges thereof: Therefore ordains the Director of the Chancery, to direct Precepts to all Prelates, Barons, Commissars, and Bealxies of Burrows, and all others our Sovereign Lord's Freeholders within this Realm, charging them to compear the said
Day*

Day and Place, for their Advice to be had in such Things, as at that Time, shall be proponed to them.

WHEREUPON the Director gives out Precepts (or Brieves) as follows, whereof I shall only insert one, directed to a Baillie, all the rest being of the same Tenor, and differing in nothing but in the Designation of the Party to whom it is directed;

JACOBUS, Dei gratia, Rex Scotorum, Ballivo suo de Cowall, et deputatis suis, salutem. Quia ex avisamento et deliberatione nostri charissimi consanguinei ac gubernatoris, ac dominorum nostri consilii, ordinavimus parliamentum nostrum tenendum apud Edinburgum, et inchoandum tali die cum continuatione dierum; vobis præcipimus et mandamus, quatenus summoneatis, seu publice summoneri faciatis, omnes et singulos Episcopos, Abbates, Priores, Comites, Barones et cæteros Libere tenentes, totius Balliæ vestræ, et de quolibet Burgo tres vel quatuor de sufficientioribus Burgenſibus

gensibus sufficientem Commissionem habentibus, quod compareant coram nobis dictis die et loco in dicto nostro Parlamento, una cum aliis regni nostri Prælati, Proceribus, et Burgorum Commissariis, qui tunc ibidem propter hoc intererunt congregati, ad tractandum, concordandum, suboundum, et determinandum ea, quæ in dicto nostro Parlamento, pro utilitate regni nostri et Reipublicæ tractanda fuerint, concordanda, subeunda, et determinanda; et vos sitis ibidem dicto die, habentes vobiscum summonitionis vestræ testimonium, et hoc Breve. Et hoc sub pœna quæ competit in hac parte, nullatenus omittatis. Datum sub testimonio magni nostri Sigilli, apud Edinburgum penultimo die mensis Maii, anno regni nostri secundq.

BALLIVO DE COWALL
PRO PARLIAMENTO.

THIS Precept was under the Testimony of the Great Seal, which was then but very little, in white Wax.

FORM of the BRIEVE or WRIT for
calling a Parliament in Great Britain.

GEORGIUS Dei gratia, Magnæ
Britanniæ, Franciæ et Hiberniæ Rex,
Fidei Defensor, Vicecomiti Comitatus de Bute,
salutem. Quia de avisamento et assensu concilii
nostri, pro quibusdam arduis et urgentibus ne-
gotiis, nos, statum et defensionem regni nostri
Magnæ Britanniæ et Ecclesiæ concernentibus,
quoddam Parliamentum nostrum apud civitatem
nostram Westminster, decimo die Maii proximo
futuri, teneri ordinavimus; et ibidem, cum
Prælati, Magnatibus et Proceribus dicti regni
nostri colloquium habere et tractatum: tibi præ-
cipimus firmiter injungendo, quod immediatè,
post debitam notitiam prius inde dandam, unum
Militem gladio cinctum, magis idoneum et dis-
cretum Comitatus prædicti. per Liberè-tenentes
ejusdem Comitatus, qui electioni hujusmodi inte-
rerunt, secundum formam statuti in eadem casu
editi et provisi, eligi facias. Tibi etiam præ-
cipimus, quod de quolibet regali Burgo Comi-

tatus prædict. unum Commissionarium ad eligendum unum Burghensem pro classe sive districtu, de discretioribus et magis sufficientibus, libere et indifferenter, juxta formam statuti inde editi et provisi, eligi facias. Et nomina eorundem Militis et Burghensis, qui tibi forent retornata per clericos ad inde appunctuatos, in quibusdam indenturis inter te et illos respective conficiendis, licet hujusmodi eligentes presentes fuerint vel absentes, inseri, eosque ad dictos diem et locum venire facias. Ita quod idem miles et burghensis plenam et sufficientem potestatem habeant ad faciendum et consentiendum his quæ tunc ibidem de communi consilio dicti regni nostri (favente Deo) contigerint ordinari super negotiis antedictis. Ita quod per defectum potestatis hujusmodi, seu propter improvidam electionem Militis et Burghensis prædictorum, dicta negotia infecta non remaneant quovis modo. Nolumus autem quod tu, nec aliquis alius Vicecomes dicti regni nostri aliquo modo sit electus. Et electiones illas quæ tibi forent certificatae et retornatae ut præfertur, nobis in cancellariam nostram ad dictos diem et locum certifies,

PARLIAMENT.

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*tifices, juxta formam statuti, una cum hoc
Breve. Teste meipso, apud Westminster 14to
die Martii, anno regni nostri octavo.*

JEKYLL BALSTRODE.

Written on the Tagg thus,
*Vicecomiti Comitatus de Bute, pro eligendo ad
parliamentum decimo die Maii proxime te-
nendum.*

JEKYLL BALSTRODE.

ESSAY

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ESSAY III.

HONOUR. DIGNITY.

THERE is no Appetite in human Nature more prevalent, nor more universal, than that for Honour and Respect. And the Pleasure arising from it is of the most refined Kind; Honour and Respect being by Nature, a voluntary Tribute paid to intrinsic Merit. Hence it is, that no other Passion is more friendly to Virtue. But tho' all Men are fond of Respect, the Bulk of Mankind, unable or unwilling to purchase it at such a Price as that of real Merit, endeavour to secure it to themselves at a cheaper Rate. Early Attempts were made to annex it to the Possession of outward Advantages, and the Law has been called in Aid to support the artificial Connection. Thus, what ought to be a Free-will Offering, is changed to a Matter of Right. We lay Claim to Honour, as if it were our Property, and as if, like Land or Goods, we were intitled to it by Law. And the World has improved so much upon this

this indolent Scheme, that the different Degrees of Respect and Honour are nicely adjusted by Custom, both in Language and Behaviour, "Qualities and Virtues being assigned to Persons of Rank, under the Titles of "Graces, Excellencies, Honours, and the rest "of this mock Praise and mimical Appellation," as is happily exprest by an eminent Author.

IN a moral View nothing can be more pernicious than this artificial Connection, as it robs Worth and Merit of their proper Reward, to annex it to the Goods of Fortune, which without it have but too great Influence. But considering the Matter politically, the fixing of artificial Marks of Worth, which every one can discern, may be justified. Government could scarcely subsist without them. Real Merit is so remote from vulgar Apprehension, that were Rulers to be chosen by this Standard, Differences, and Dissensions would be endless.

How-

HOWEVER this be, here arises a Distinction betwixt Respect bestowed from the Opinion of Merit, which may be called *natural Honour*, and Respect bestowed upon the Possessors of Power and Riches, which may be called *artificial Honour*.

AMONG the Ancients, this artificial Honour was but in its Infancy; yet in old *Rome* we have a remarkable Instance of it. There was a Division of the People into *Nobiles*, *Novi*, and *Ignobiles*, taken from the Right of using Pictures or Statues, an Honour allowed to such only whose Ancestors, or themselves, had born some curule Office. He who had the Pictures or Statues of his Ancestors, was termed *Nobilis*; he who had only his own, *Novus*; he who had neither, *Ignobilis*: So that *jus imaginis* was among the old *Romans* like the Right of bearing a Coat of Arms among us.

BUT this artificial Honour grew to a greater Height in Course of Time. Besides

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its Connection with the higher Offices in the State, as among the *Romans*, it came to be annexed to large Territories, and at last rested upon Families, without Regard to Land or Office. This was the Case in all the *Gothic* Constitutions, and to these two Branches I shall confine myself, as they are the Foundation of our present Notions of Dignity and Honour.

IN these *Gothic* Constitutions, Honour and Dignity were originally annexed to Lands and Offices, and in no Case to Persons or Families, independent of Lands and Offices.

EARL or Count was the Name given to the Governor of a Province. The Office was of great Power and Authority, and could not fail to have a considerable Share of Dignity annexed to it. *Basnage*, in his Customs of *Normandy*, observes, that Counts were the ordinary Judges of Provinces, that under *Charles* the Simple, they began to be hereditary, and that some few of them usurped the

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Sovereignty. In the same Way an Earl in *England* was the Judge or Governor of a Shire, and his Office as well as Dignity for Life only. *William* the Conqueror first made the Office feudal and hereditary, allotting the third Penny of all the Pleas determined in the Sheriff's Court, for Support of the Office. This Accession of Wealth and Dignity had the ordinary Effect. Earls became too great to submit to the Fatigue of Business. Deputies were appointed in every County, upon whom was devolved all the Drudgery Work of the Magistrate and Judge. And thus it commonly happens, that the Person who reaps the Profit does nothing; while the Person who does all the Work, is very slenderly rewarded. After Introduction of these *Deputies, Vicecomites* or *Sheriffs*, an Earldom was no longer considered as a territorial Office, but as a territorial Dignity, which carrying a good deal of Splendor with it, came to be a desirable Object. As it no longer had any Relation to a real County or Sherifdom, fictitious or imaginary Counties were

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erected,

erected, in order to bestow the Title of *Earl* upon the Possessors. And these Titles by the Bounty of Princes, came to be multiplied exceedingly; it being observed with Regard to Ribbons, Titles, and such like Marks of Distinction, which take nothing from the Granter, that of all Favours, they are bestowed with the best Grace. Rare Invention, this, to reconcile, in so happy a Manner, the Interests of the Giver and Receiver.

It is observed above, that in the *Gothic* Constitutions, Honour and Dignity were annexed to Lands as well as to Offices. In *England* a great Estate held of the King, with Power of Jurisdiction, &c. and a *Reddendo* of so many Knights to serve the King in his Wars, commonly stiled a *Barony*, had Dignity or Honour annexed to it; and from this artificial Connection, it also got the Name of an *Honour*, the Honour of *Richmond*, for Example, of *Woodstock*, &c. And the Family here was so little regarded, that whoever purchased such an Estate, with the King's Consent,

sent, to be held of the Crown, was of Course, considered as a Baron, or Person of Honour.

ORIGINALLY the Union of Lands, erected into an Earldom or Barony, was conceived to be so intimate, that it became as it were an identical Subject, not capable of Division or Separation into Parts. And hence, in the old Law of *England*, it was a Rule, that a Barony could not be split into Parts, but that the whole behoved to be alienated together.

BUT this being a strained Conception, repugnant to more plain and natural Ideas, especially where Parts of an Earldom or Barony are locally separated one from another, Nature prevailed over Art, and the disposing of Parts of a Barony crept into Practice.

FOR some time after this Sort of Commerce was introduced, territorial Honour was not much affected by it. The Earldom or Barony still remained in a great Measure entire with the Dignity annexed to it. But when,
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by the Arts of Peace, and Increase of Industry, Lands came to be more universally the Subject of Commerce, readily passing from Hand to Hand, territorial Honour behoved to be in an uncertain State. Let us suppose, that an Earldom or Barony has been possessed for Ages by the same Family. The Family falling into Decay, the Estate is dismembered Piece-mail, 'till little or nothing is left of it. What is become, in the mean Time, of the Dignity or Honour originally annexed to the Estate? For the Estate being split into small Parts, and possessed perhaps by mean Persons, the Honour cannot follow any of the Parts. Is the Idea then lost and gone? If it does subsist, where is the Object? The Answer is, That it is transferred from the Estate to the Family; and the Transition is easy and natural. For tho' Possession of the Earldom or Barony, is the Foundation of the Respect paid to the Family, yet the Family being the immediate Object, Respect is paid by the Vulgar without attending to the legal Title, and is continued to be paid even after the Title is gone.

gone. Thus in Germany, territorial Titles of Honour are communicated to every Branch of the Family, tho' possessed of no Land Property; and therefore, no Wonder, that in Britain, the Title should remain with the chief Branch of the Family, after the Estate is dilapidated.

ONE Thing did facilitate the transferring of Honour from Land to Families. It was *Malcolm Canmore*, who, in Imitation of *William the Conqueror*, introduced the territorial Dignities of Earl and Baron, which produced Surnames not formerly in Use. *Malcolmus tertius, sublato Maccabæo Tyranno, Regnum legitime sibi lebitum, occupavit, quod, ut ornaret, uni-
câ curâ incubuit; tunc et a Prædiis nobilibus nomina quisque sumpsit, et cum magna frequensque nobilitas S. Margaretam ex Hungaria & Anglia secuta, in Scotia confedisset, splendorem novo suo Principatui addidit, Barones et Comites creavit.* *Dempster, p. 120.* The Use of Surnames had undoubtedly

edly the Effect to make a closer Union among the several Parts of the compound Idea of a Family, by binding all these Parts together under one common Name; which tended to facilitate the Connection betwixt a Family and a Title of Honour, and made it as easy for the Mind to rest upon a Family for the Object of Honour, as upon an Estate.

It will be obvious, that this Change in the Nature of Honour, from territorial to personal, behoved to come on by Degrees. Even after frequent Instances of the Title remaining with a Family, when the Estate was entirely or mostly dismembered, the Case would be different, when the Earldom or Barony was disposed whole and entire; for there the Honour for many Ages, was certainly transferred with the Estate. Opposite Instances behoved to breed a Confusion and Darkness in the Idea of Honour, being sometimes applied to Lands, sometimes to Families, independent of Lands. The Matter is settled by Course of Time. The Notion of territorial

rial Honour is quite wore out, and at present we have no Example of Honour, but what is personal, and annexed to Families, independent of Land. I have heard of no Exception in this Island, unless it be with relation to the Castle of *Arundel*, which at the same Time appears to be a doubtful Instance.

Tho' territorial Honours be now at an End, there remains one remarkable Consequence of them, which is in full Observance. It is a Maxim in Law, that the King is the Fountain of Honour, and that it is the Prerogative of the Crown to bestow Honours and Dignities of all Kinds. It is not difficult to come at the Foundation of this Privilege. Tho' it be the Privilege of every Superior to unite discontiguous Lands into one artificial Subject, in favours of his Vassal; the King is the only Superior who can unite Lands into an Earldom or Barony, for a plain Reason, that it is not called an Earldom or Barony, unless it hold of the King. The Honour which followed this Erection or Cre-

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ation was understood to flow from the King; and as the King's Consent in the Quality of Superior, is requisite for transmitting an Earldom or Barony to a Purchaser, hence the King came to be considered as the Fountain of territorial Honour, in the same Manner as he is the Fountain of official Honour, by his Power of appointing the Officers of the Crown, Taking the Matter strictly, it was not the King who bestowed the Honour, but the People. Nothing flowed from the Crown, but the Office or the Barony, which carrying great Power and Preheminence, was naturally attended with Honour and Respect. And supposing Honour to be a legal Accessory of a Barony or Office, it will not follow, that the King can create Honour, independent of a Barony or Office, which would be creating an Accessory without a Principal. But our Forefathers were by no Means accurate in their Conceptions: And from the King's Power of bestowing the Means of acquiring Honour, to infer a Power of bestowing Honour independent of these Means, is no bet-

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ter Reasoning, than to infer a Man's Power of bestowing Knowledge without any Means, from his Power of bestowing Riches, which are one good Means to acquire Knowledge. Yet upon this, and no better Foundation, is the King's Power built, of bestowing personal or Family Honours, when these, by Degrees, came to be substituted in Place of the other.

AND thus a new Distinction was, by Degrees, introduced, betwixt Honour annexed to Land or Office, and Honour annexed to Persons, whether a single Person or Family. And this latter Sort of artificial Honour, I shall take the Liberty hereafter to call *personal Honour*, tho' very different from that Respect and Deference which is voluntarily paid to certain Persons, from the Opinion of real Worth.

T H E R E are preserved in *England* many old Charters of the Creation of Earls, which uniformly run in the Stile of a Grant of an Office. When by the Multiplication of

Earls beyond the Number of Sheriffdoms, an Earldom sunk down to a mere territorial Dignity, the Stile of these Charters was varied, and the common Form was to erect Lands into an Earldom, in favours of the Grantee and his Heirs, which was understood to be all that was necessary to bestow upon him the territorial Dignity. Afterwards, when the Notion of Personal Honour crept in, certain Solemnities were used at the Creation of a Peer, such as girding him with a Sword, covering his Head with a Cap of Honour and Circle of Gold, all of them Marks of personal Respect. And now, both in *England* and *Scotland*, the Notion of territorial Honour being quite wore out, an Earl's Patent is so framed, as to import a mere personal Dignity, without relation either to Office or to Land.

WITH Regard to *Scotland*, the oldest Patent of an Earl I have seen, is that granted to *Ranulph Earl of Murray*. King *Robert I.* grants certain Lands to him, and to the Heirs-
male

male of his Body, to be held of the Crown
in libero comitatu. As no other Form or Ce-
remony was used in creating this Gentleman
an Earl, the Charter is full Evidence, that in
those Days the Title of an Earl was confide-
red as merely a territorial Dignity. A Copy
of the Charter is annext for the Satisfaction
of the curious. Another Charter I have read
of by King *David II.* " in Favours of Sir
" *Malcolm Fleming* Knight, and of the Heirs
" male of his Body, for his Homage and
" worthy Services, of the Lands of *Farynes,*
" *Deall, Rynos,* and the Burgh of *Wigtoun,*
" with their whole Pertinents, and all the
" King's Lands of the whole Sheriffdom
" of *Wigtoun,* with the Advocation of the
" Churches, and Right of Patronage of the
" Monasteries and Abbacies existing within
" the Sheriffdom; reserving to his Majesty the
" Right of Patronage of the Episcopal See of
" *Whytehorn* or *Galloway.* And also because
" the said Place of *Wigtoun* was lookt upon as
" the principal Mannor of the whole She-
" riffdom of *Wigtoun,* the King ordained,
" that

" that the said *Malcolm* and his Heirs should
 " for ever take the Name of *Earl*, and be
 " called the Earls of *Wigtoun*. Further, the
 " said Lands are erected into a free Regality,
 " with Power to judge upon the four Ar-
 " ticles of the Crown. The said Earl and
 " his Heirs giving the Service of five Knights
 " or Soldiers to the King's Army. Dated
 " at *Airth*, 9th November, 1343." This
 Creation of the Earl of *Wigtoun* I have chose
 the rather to mention, because of one no-
 table Circumstance which demonstrates the
 Notion entertained in these Days of this Dig-
 nity, that it was merely territorial, and went
 along with the Lands to the Purchaser, in the
 same Manner that the Dignity of a Baron by
 Tenure did. Upon the 16th July, 1371, a Char-
 ter is granted by *Thomas Fleming* Earl of *Wig-*
toun, to *Archibald* of *Douglas* Knight of *Gal-*
loway, " Whereby, for the Feuds betwixt
 " him and the great Men, and Inhabitants of
 " the Earldom of *Wigtoun*, and for 500 l.
 " Sterling paid him, he disposes to the said
 " *Archibald* the foresaid Earldom with the
 " Per-

"Pertinents." This Charter was confirmed by Robert King of Scotland, 8th February, 1371. After this Alienation of the Earldom, Thomas Fleming was no longer considered as an Earl, of which among other Writs the following Charter is full Evidence, granted by Robert II. in which "he confirms a Charter granted by the said Robert Fleming, designed Laird of Fullwood, to William Boyd, of a Wadset of all the said Thomas Fleming's Lands within the Barony of Lenzie, for 80 l. Sterling." The principal Charter is dated at Cumbernauld, 1372, and the Charter of Confirmation at Kinghorn, 20th June, 1375. Further, that the said Archibald Douglas Knight of Galloway, did, after the Purchase of the Earldom, take upon him the Title of Earl of Wigtoun, appears by a Charter of Confirmation still extant, granted by him to Christian Ramsay, of the Lands of Balencreif and Gosford, dated 6th March 1422, which runs thus, *Omnibus hanc chartam visuris vel audituris, Archibaldus de Douglas, Comes de Wigtoun,*

Wigton, ac primogenitus filius et heres magnifici et potentis Domini, Domini progenitoris nostri, Domini Archibaldi Comitis de Douglas, Domini Galwidie et vallis Annandie, salutem, &c.

THERE is little Doubt of the gradual Transition, in *Scotland*, as well as in *England*, from the Notion of territorial to that of personal Dignity; and the Stiles of our latest Patents in *Scotland*, as well as in *England*, are expressive of nothing else but personal Honour.

PROCEED we now to a more particular Examination of the Dignity of Lord Baron. In *England*, three sorts of Barons are taken Notice of by Writers, Barons by *Tenure*, Barons by *Writ*, and Barons by *Creation*. Barons by *Tenure* are they who derive their Dignity and Privileges from their Lands, the same who are described above, under the Name of *territorial Barons*. Barons by *Writ* came to have a Being after the smaller Barons

Barons and Freeholders were exempted from their Attendance in Parliament. The Exemption was granted in *England*, as well as in *Scotland*, with a reserved Power to the King, to require the Attendance of any of them in Parliament, when he should see Cause. This was done by a special Writ, directed by the King to the small Baron or Freeholder, whose Presence was required, and who was not otherwise bound to attend the Parliament. But as this Writ, whether we consider the Nature or Tenor of it, was fulfilled by the Person's Attendance in that particular Parliament to which he was called, leaving him to enjoy his Privilege of Exemption from other Parliaments, when the Summons was not renewed, it does not readily occur why this Writ should be thought to bestow any Degree of Nobility, whether personal or feudal. And supposing it did, the Person thus summoned to Parliament was still a Baron by Tenure; because none could be subjected to this Summons, but those who held of the King *in capite*. This Distinction

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therefore is little to be regarded, and accordingly we have no Traces of it in our Scotch Antiquities.

BARONS by Patent are those who are created by the King, Barons and Lords of Parliament. It is agreed among Authors, that the first Instance of this Kind upon Record is in the Days of Richard II. who in the Year 1387, created *John Beauchamp of Holt*, Baron of *Kidderminster*, and Lord of Parliament. The Patent is in the following Words, *Rex, &c. salutem. Sciatis quod pro bono servitio quod dilectus et fidelis Miles noster Joannes de Beauchamp de Holte, Senescallus Hospitii nostri, nobis impendit, ipsum Joannem in unum Parium et Baronum Regni nostri Anglie præfecimus, volentes quod idem Joannes, et hæredes masculi de corpore suo exeuntes, statum Baronis obtineant, ac Domini de Beauchamp, et Barones de Kidderminster nuncupentur. In cuius, &c. Dat. 10. Octob. &c.*

I HAVE

I HAVE given this Patent at large, that the Nature of the Grant may be the better understood; and it merits Attention, because, by creating Earls without Relation to a County, and Barons without Relation to a Barony, Foundation was laid for a great Change in the Constitution of Parliament, though the Consequence was probably not attended to in the Beginning. The Parliament was originally made up of the King's Vassals, and the King had no Power to bring any Person into Parliament, who did not hold of him in chief. By the Multiplication of Earls beyond the Number of Counties, which was begun upon the Fiction of erecting a Castle, or a Mannor into a County, and afterwards carried on without that Form, the Title of *Earl* came to be considered as a personal Dignity; and now here was another Dignity invented, by creating a Man a Baron and Lord of Parliament; which, though it was probably at first bestowed upon Barons by Tenure, came afterwards to be bestowed upon all Persons indifferently, without Regard to Land.

An Earl originally was intitled to sit in Parliament, as the King's immediate Vassal, and a Baron upon the same Footing. But now, as the King, by gradually diverging from the original Constitution, has acquired by long Use, the Privilege of making an Earl without a County, and a Lord of Parliament without a Barony, it may happen some time hereafter, that the House of Peers shall be filled with Men who have little or no Property in Land. It must be acknowledged, that seldom has the Peerage been bestowed but upon Men of opulent Fortunes. But as the Crown is under no Restraint in this Particular, we owe it more to the Goodness of our Sovereigns, than of our Constitution, that the House of Peers is composed of Members who, if they are not intirely independent, have themselves more to blame than their Circumstances.

Tho' the above Diploma is the oldest that is upon Record, it follows not, that it is the first of the Kind. The Stile of the Diploma rather

rather argues an established Practice, as it is not introduced with any Preamble, importing a new Dignity. At what Time then, by whom, and upon what Occasion this new Class of Peerage was invented, is uncertain. It may appear hard to be conceived at first View, what could be the Intention of it. In the Reign of *Richard II.* and for a long Time before, none but the greater Barons attended the Parliament, the lesser Barons and Freeholders appearing by their Representatives. Now to what Purpose could it be, to create a great Baron, Lord of Parliament, who was intitled already to that Privilege. And if the Honour was designed for a lesser Baron or Freeholder, it was sufficient to call him to Parliament by a special Writ. But when the Matter is more attentively considered, there will be found probable Reasons for introducing of this Dignity. The Commerce of Land, begun some Centuries before, was greatly increased in the 1387. A Barony by Tenure, which was originally a permanent Dignity in a Family, was no longer considered as such, after fre-

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quent Instances of the Transmission of these Dignities from Hand to Hand, in the Way of Commerce. The Dignity which was considerable, while it was confined to certain Families, fell in its Value, after it came to be exposed to Sale, with the Barony to which it was annexed. This made People aim at some external Mark of Honour, which should be permanent in their Families, as Baronies had been of old. And this was effectuated, by creating them and their Heirs Barons, and Lords of Parliament; for here the Dignity and Privilege being bestowed upon a Family, and not upon Land as formerly, was inherent in the Family, and behoved to subsist so long as the Family subsisted. Nor did this Invention require any great Stretch of Fancy: For, at this Period, and before, the Notion of personal Honours had gained Ground, by the frequent Examples of Earls created with a very slight Relation to Property.

IN *Scotland*, where there has been all along a close Imitation of *English* Customs,
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the Dignity of Lord of Parliament was early introduced; at what precise Period we know not: We are only certain, that this Dignity was possessed by many Families, before the Reign of our *James I.* The Act so often mentioned, exempting the small Barons and Freeholders from Attendance in Parliament, is sufficient Evidence, since it contains a Regulation, "That Bishops, Abbots, Priors, Dukes, Earls, LORDS OF PARLIAMENT and Barrents, be summoned to Parliament by special Precept." Whether Patents were originally used in the Creation of our Lords of Parliament, is not certain. I incline to think they were not used, because I have seen no such Patent before the Days of *James VI.* Probably there was no other Form used but what is contained in the Records of Parliament, bearing, that the King, in full Parliament, created such a Man, and certain Heirs mentioned, Lords of Parliament, and ordained him to be stiled *Lord A. B. of C. D.* the ordinary Form being to annex *Lord* to the Surname, with the Addition of the Name
of

of the Estate, connected by the Particle *of*; for Example, Lord *Lindsay of Byres*, Lord *Stewart of Ochiltree*. I must further observe, that if Lords of Parliament were created among us without a Patent, the Ceremony must have been performed in Parliament.

THE Barons, by Creation called *Lords of Parliament*, were distinguished in Common Language from the Barons by Tenure, by being called *Lords*, such as, Lord *Erskine*, Lord *Borthwick*, Lord *Seaton*, &c. whereas Barons by Tenure were called *Lairds*; for Example, the Laird of *Dundas*, the Laird of *Calder*, the Laird of *Lufs*, &c. Because there is no *Latin* Word for a Laird, the Barons by Tenure were called *Domini*, as well as the Lords of Parliament were. But then to express the Difference, the following Forms were constantly observed. If a Laird, or Baron by Tenure, was meant to be expressd, it was in this Manner, *Dominus de Calder*, *Dominus de Balwirie*, *Dominus de Lufs*, &c. But Lords of Parliament were expressd by leaving out the

the Article, thus, *Dominus Erskine, Dominus Seaton, Dominus Bortwick.* For Illustration's Sake, I have annex'd a Copy of the Roll of the Parliament 1471, containing, 1^{mo}, A List of the Bishops who appeared in that Parliament; 2^{dly}, Of the Abbots; 3^{dly}, Of the Earls; 4^{thly}, Of the Lords of Parliament; 5^{thly}, Of the Barons by Tenure; and lastly, Of the Commissioners for the Burrows.

It is certain, that the Lords of Parliament had no greater Power or Privilege in Parliament than the Barons by Tenure had; yet as it was understood to be the King's Intention, in creating a Lord of Parliament, to exalt the Person honoured to a Rank above that of a Baron by Tenure, the Nation has all along submitted implicitly to the King's Will, as most Nations do with Regard to Titles of Honour bestowed by the Sovereign. And there are two Circumstances which probably had an Influence to heighten the Respect paid in Consequence of such Creations. The Attendance of a Baron by Te-

N

nure

nure in Parliament, is a Service, and not a Matter of Right; whereas, when one is created Lord of Parliament, the Power of attending Parliaments is bestowed upon him as a Privilege. The other Circumstance must have had still a greater Weight in the Imagination. The Honour of a Baron by Tenure was annex'd to the Land, and went with it to the Purchaser of the Barony along with the Jurisdiction, and its other Accessories. The frequent Transmission of Baronies from Hand to Hand, with the Honour annex'd, could not fail to depreciate the Dignity, in the Opinion of all Men. A Man who, after passing many Years in an obscure Rank, purchases an Honour with his Money, must lay his Account, for some time, not to have great Respect paid him. And tho' the Respect paid to an old Family, will run on a long Time after the Family-Estate is gone; yet it must dwindle by Degrees, 'till the Family at last be lost in the common Mass. It will be obvious, from these Considerations, that territorial Honour could not

long

long stand its Ground after the Commerce of Land was introduced, and it will be equally obvious, that this Circumstance bechove to add a great Lustre to the Dignity of a Lord of Parliament, which was annexed to the Family, and inteparable from it. Accordingly, after the Lords of Parliament were multiplied by frequent Creations, the Barons by Tenure, who made no Figure in Comparison, tired of the Expence of attending Parliaments, without any Return either of Profit or Honour, withdrew by Degrees. In latter Times, the Barons by Tenure, who attended Parliaments, were mostly the eldest Sons of the Nobility, ineft in Lands, to intitle him to a Seat there. And in Fact, for forty Years before the 1587, there is not to be found in the Rolls of Parliament, a single Instance of a Baron by Tenure attending the Parliament.

It was in this Year 1587, that the Statute of James I. of Scotland was revived, requiring the lesser Barons to send Commissioners to Par-

liament; and so little Regard was had to Barons by Tenure in this Act, that by an express Clause, "All Freeholders of the King, " under the Degree of Prelates and Lords " of Parliament, are to be warned by Proclamation to be present at the chusing of " these Commissioners." It was this Act then, which gave the finishing Blow to Barons by Tenure, by depriving them of their Seat in Parliament, and thereby reducing them to the Rank of small Barons and Freeholders, who have no other Privilege, but to send Representatives to Parliament: And hence a *Scotch* Laird has come to be in some Measure a Term of Reproach, like a *French* Marquis, or a *German* Baron.

It remains only to be examined, by what Means it happened, that the Commerce of Land, which has quite annihilated the Honour of a Baron by Tenure, had not the same Effect with regard to the Dignity of an Earl. It is clear from what is above said, that both of them were once territorial Dignities, and that

HONOUR. DIGNITY. FOR

that when the Estate was alienated, the Dignity went along with it. We may readily believe, that the Dignity of an Earl was pretty much obscured, by this Means, as well as that of a Baron; and we have Tradition to confirm us in this Opinion. Yet after personal Honour was introduced, whereby we came to separate the Dignity from the Estate; the Title of Earl encreased in Repute, while that of Laird, which was the Title of a Baron by Tenure, dwindled away to nothing. When this Matter is considered, a ready Solution will occur. The Introduction of that new Class of Nobility, called *the Lords of Parliament*, which had the Effect to overshadow and obscure the Barons by Tenure, plainly contributed to exalt the Earls. Place and Precedency work strongly upon the Imagination, because they are public and palpable Marks of Respect. The Barons by Tenure, such of them who had the greatest Estates, or made the most remarkable Figure, were generally called to be Lords of Parliament; and some of them were more highly exalted,

alted, being made Earls. The Body of territorial Barons being thus impoverished, by the frequent Draughts made out of it, came to be little respected. They by Degrees withdrew from Parliament, as finding nothing there to answer the Expence of Attendance; and they were excluded altogether by the Act 1587, which in these Circumstances could not, at any Rate, be reckoned a Hardship, and possibly was carried through with their Consent or Good-liking. The Removal of the Barons by Tenure from the Parliament, behoved to add a Lustre to the Lords of Parliament, and still a greater Lustre to the Earls, who took Place of them. And as by this Time, an Earldom was considered as a Family Dignity, as well as was a Baronage by Creation, the Earls could not fail to preserve their superior Rank in the Minds of the People, as well as they did in the Rolls of Parliament.

King Robert's CHARTER to Ranulph Earl
of Murray.

ROBERTUS, Dei gratia, Rex Scotorum,
omnibus probis hominibus totius terræ suæ
salutem. Sciatis nos dedisse, concessisse, et hac
præsenti carta nostra confirmasse Thomæ Ra-
nulpho militi, dilecto nepoti nostro, pro homa-
gio et servitio suo, omnes terras nostras in Mo-
ravia, sicut fuerant in manu Domini Alex-
andro Regis Scotiæ prædecessoris nostri ultimo
defuncti, una cum omnibus aliis terris adja-
centibus, infra metas et divisas subscriptas con-
tentis, incipiendo videlicet ad aquam de Spee
sicut cadit in mare, et sic ascendendo per ean-
dem aquam, includendo terras de Fouchabre
Rotbenayks, Rothays et Bocbarine per suas
rectas metas et divisas, cum suis pertinentiis;
et sic ascendendo per dictam aquam de Spee us-
que ad marchias de Badenach, et sic includendo
omnes terras de Badenach et Kyncardyn et de
Glencarn cum pertinentiis, per suos rectas me-
tas et divisas; et sic sequendo Marchias de Ba-
denach

denach usque ad marchiam de Louchabre, et sic includendo terras de Louchabre de Maymez de Lexbarketh de Glengarech et de Glenneig, cum pertinentiis, per suas rectas metas et divisas; et sic sequendo marchiam de Glenelg usque ad mare versus occidentem, et sic per mare usque ad marchias boreales Ergadiæ quæ est Comitatus de Ros, & sic per marchias illas usque ad marchias Rossæ, et sic per marchias Rossæ quousque perveniatur ad aquam de Forne; et sic per aquam de Forne quousque perveniatur ad mare orientale: Tenendas et habendas dicto Thomæ et heredibus suis masculis de corpore suo legitime procreatis seu procreandis, de nobis et heredibus nostris in feodo et hereditate in LIBERO COMITATU, ac in libera regalitate, cum quatuor querelis ad Coronam nostram regiam spectantibus, et cum omnibus placitis et querelis, tam in communibus indictamentis, quam in brevibus placitabilibus, et cum omnibus aliis loquelis quibuscunque ad liberam regalitatem pertinentibus, vel aliquo modo pertinere valentibus, adeo libere, quiete plenarie et honorifice sicut aliqua terra infra regnum nostrum in regalitate

galitate liberius, plenius, quietius aut bonari-
ficentius dari poterit aut teneri: una cum mag-
na custumia nostra burghi de Invernys et coketo
ejusdem, et libertatibus suis in omnibus, ex-
cepta tantummodo parva custumia dicti burghi,
cum plenaria potestate attaciandi, accusandi
et in omnibus ministrandi ac judicandi omnes
illos dicti Vicecomitatus injurias, dampna seu
præjudicia facientes indebitè custumæ prædic-
tæ, adeo libere in omnibus, sicut nos vel ali-
quis ministrorum nostrorum ipsos attachiare,
accusare, ministrare seu judicare potuimus, seu
poterit in præmissis; et quod dictus Comes et
hæredes sui amerciamenta, excaetas seu foris-
facturas inde contingentes adeo libere et quietè
babeant et possideant in futurum, sicut nos seu
aliquis prædecessorum nostrorum dicta amerci-
amenta, excaetas seu forisfacturas aliqua tem-
pore habuimus. Quare vicecomiti nostro de In-
vernys et ballivis suis, ac præpositis et ballivis
dicti burghi qui pro tempore fuerint, ac ceteris
quorum interest, firmiter præcipimus et man-
damus, quatenus præfato Comiti et heredibus
suis prædictis ac suis ministris sint intendentes

et respondentes, consulentes et auxiliantes, super his, si necesse fuerit, nostra regali potentia invocata, sine aliquo alio mandato nostro speciali interveniente. Volumusque et concedimus quod dictus Thomas et heredes sui predicti habeant, teneant et possideant dictum Comitatum cum manerio de Elgyn, quod pro capitali mansione Comitatus Moraviae de cetero teneri volumus et vocari, et cum aliis omnibus maneriis, burgis, villis, thanagiis et omnibus terris nostris dominicis firmis et exitibus infra predictas metas contentis, cum advocationibus ecclesiarum, cum feodis et forisfacturis, cum silvis et forestis, moris et maresis, cum viis et semitis, cum aquis, stagnis, lacubus, vivariis et molendinis, cum piscationibus tam maris quam aquae dulcis, cum ventionibus, aucupationibus et avium aeriis, cum omnibus aliis libertatibus, commoditatibus, assiammentis et justis pertinentiis suis, in omnibus, et per omnia, tam non nominatis quam nominatis: quibus heredibus dicti Thomae masculis deficientibus, quod absit, volumus quod dictus comitatus ad nos et heredes nostros liberè

et

et integrè, ac sine aliqua contradictione revertatur. Volumus etiam et concedimus pro nobis et heredibus nostris, quòd omnes Barones et Liberè-tenentes dicti Comitatus, qui de nobis et prædecessoribus nostris in capite tenuerunt, et eorum heredes, dicto Thomæ et heredibus suis prædictis, homagia, fidelitates, sectas curiæ, et omnia alia servitia faciant, et baronias et tenementa sua de ipso et heredibus suis prædictis de cetero teneant: salvis tamen Baronibus et Liberè-tenentibus prædictis, ac eorum heredibus, juribus et libertatibus curiarum suarum hætenus justè usitatis. Volumus insuper et concedimus, quòd burgi et burgenses sui de Elgyn, de Fores, et de Invernarne, easdem libertates habeant et exercent quas tempore Domini Alexandri Regis Scotiæ prædicti et nostri habuerunt; hoc solum salvo, quòd de nobis tenebant sine medio, et nunc de eodem Comite tenent cum eisdem libertatibus. Salvo etiam nobis et heredibus nostris in hac donatione nostra, burgo nostro de Inverness, cum loco, castelli et terras ad dictum burgum pertinentibus, cum piscatione aquæ de Nisf, et cum

molendinis aquæ ejusdem, cum sequela dicti
 burgi et terrarum ad ipsum burgum tantum-
 modo pertinentium: et salvo nobis et heredi-
 bus nostris fidelitatibus Episcoporum, Abba-
 tum, Priorum et aliorum Prælatorum Ec-
 clesiæ Moraviensis, et advocacione seu jure
 patronatus ecclesiarum earundem et eorum statu
 in omnibus quem habuerunt tempore Regis A-
 lexandri prædicti, et aliorum prædecessorum
 nostrorum Regum Scotiæ: excepto quod homi-
 nes eorundem citati per nos ad defensionem
 regni nostri intendant vexillo et sequi tenean-
 tur vexillum dicti Thomæ Comitis et heredum
 suorum prædictorum, unâ cum aliis qui vex-
 illum Moraviæ sequi solebant antiquitus: fa-
 ciendo nobis et heredibus nostris dictus Thomas
 et heredes sui prædicti pro dicta Comitatu, ser-
 vitium octo militum in exercitu nostro, et Sco-
 ticanum servitium, et auxilium de singulis da-
 vacis debitum et consuetum, tantummodo, sine
 secta curiæ ad quamcunque curiam nostram
 facienda. In cujus rei testimonium presenti
 cartæ nostræ sigillum nostrum præcepimus
 apponi. Testibus venerabilibus Patribus Wit-
 lelmo

*Johni Sancti Andree, Willhelmo Dunkeldensi,
 Henrico Aberdinensi, Dei gratia, Episcopis,
 Bernardo Abbate de Aberbrothock Cancellario
 nostro, Malcolmo Comite Lennox, Gilberto de
 Haya, Roberto de Keth Marescallo Scotie,
 Alexandro Margus et Henrico de Sancto claro,
 militibus,*

DIPLOMA of an Earldom, containing
 the Form of Belting, &c.

JACOBUS, Dei Gratia, Rex Scotorum,
 omnibus probis hominibus totius terræ suæ,
 clericis et laicis, salutem. Cum dilectus noster
 consanguineus Robertus Dominus Seytoun, ex
 clarissima & illustrissima stirpe vetustaque de
 Seytoun familia descenderit, quæ multis ab-
 olinc seculis per nostros felicitis memoriæ pre-
 decessores optimo dominorum merito dignitatem
 et honorem liberi Baronis et domini parliamen-
 ti regni nostri Scotiæ consequuta est; cumque
 majores dicti consanguinei nostri, in omni offi-
 cio et fidelitate versus nos et predecessores no-
 stros

stros firmiter permanserint ; Idemque consanguineus noster antecessorum suorum merita non solum adequaverit, sed etiam eximiis suis virtutibus ita de nobis meritus sit, ut regalis nostri status ac muneris dignitas et munificentia postulent ne patiamur eum et successores suos meritis honoribus et claritudine destitui, sed potius ut egregie factis honor etiam et claritas accedat ; Noveritis igitur nos de consilio procerum et digni regni nostri primatum, exigentibus præmissis, creasse, ordinasse, constituiisse et erexisse, tenoreque præsentium creare, ordinare, constituere et erigere antedictum consanguineum nostrum Robertum Dominum Seytoun, et heredes suos masculos Comites de Wentoun, eidemque Roberto ac heredibus suis predictis nomen, statum, gradum, titulum, honorem et dignitatem Comitis de Wentoun in omnibus et singulis preeminentiis, dignitatibus, honoribus, et ceteris quibuscunque ejusmodi statui Comitis de Wentoun, pertinere seu spectare valentibus, damus et concedimus. Ipsumque dictum Robertum et heredes suos prædictos hujusmodi statu, gradu, titulo, honore et dignitate

*tate Comitis de Wentoun per cincturam gladii,
 ac unius cappæ honoris et dignitatis, et cir-
 culi aurei circa caput positionem insignivimus,
 investivimus et realiter nobilitavimus. Te-
 nend. et habend. nomen, statum, titulum, gra-
 dum, honorem et dignitatem Comitis de Wen-
 toun prædicti, cum omnibus et singulis preemi-
 nentiis, honoribus, et ejusmodi ceteris quibuscun-
 que statui Comitis de Wentoun pertinentibus
 seu spectantibus, præfato Roberto Comiti de
 Wentoun, et heredibus suis prædictis, in om-
 nibus et singulis parliamentis nostris, here-
 dum et successorum nostrorum, publicisque con-
 ventionibus et comitiis infra dictum nostrum
 regnum Scotiæ tenendis; necnon ut habeant e-
 jusmodi voces, preeminencias, dignitates, status,
 honores, et loca, in omnibus quæ aliquis comes
 dicti regni nostri ante hæc tempora melius, ho-
 norificentius, et quietius habuit, seu usus ga-
 visus fuit, vel in præsentī gaudet et utitur.
 Et quod dictus Robertus et heredes sui præ-
 fati successive vocitentur et nuncupentur Co-
 mites de Wentoun perpetuo in futurum, et qui-
 libet eorum vocitetur et nuncupetur; ac ut Co-
 mites*

-mittes Parlamenti et regni nostri antedicti tra-
 -stantur, teneantur, et reputentur, ac quilibet e-
 -orum successive tradetur, teneatur, et reputetur.
 -In cujus rei testimonium, presentibus manu no-
 -stra subscriptis magnum sigillum nostrum appen-
 -di mandavimus. Ex arce nostra sancruciana
 -die decimosexto Novembris, anno Domini mille-
 -simo sexcentesimo, coram his testibus, prae-
 -dictis nostris consanguineis et consiliariis, Joanne
 -Marcbione de Hamilton, Comite Arraniae, Do-
 -mino Evan, &c. Joanne Comite de Montrois,
 -Domino Graham, &c. Cancellario nostro; Geor-
 -gio Mariscalli Comite Domino Keyt, &c. reg-
 -ni nostri Mariscolla. Dilectis nostris fami-
 -liaribus, Consiliariis, Domino Jacobo Elphinston
 -de Barntoun milite, nostro Secretario; Ricar-
 -do Cockburne juniore de Clerkintoun, nostri se-
 -creti sigilli custode, militibus; Magistro Jo-
 -anne Skene nostrorum rotulorum, registri ac
 -consilii, clerico; Domino Joanne Cockburne de
 -Ormesboun milite, nostra justiciaria clerico;
 -Magistro Willmo Scot de Elie, nostre Con-
 -trollaria Directore.

JACOBUS R.

DIPLOMA of an Earldom of a later Date,
without any of the above Forms.

ANNA, Dei gratia, Magnæ Britannicæ,
Franciæ et Hiberniæ, Regina, fideique
defensor; omnibus probis hominibus ad quos
præsentes literæ nostræ pervenerint, salutem.
Quandoquidem nos regio nostro animo perpen-
dentes nos, nostrosque regios antecessores per-
plurima fidelia servitia à nobili et antiqua
familia de Argyle accepisse, toties agnata in
diplomatibus aliisque magni momenti commissi-
onibus et muneribus plurimis hac præclara fa-
milia ortis, concessa, et quæ non minus sibi-
ipsis honorem, et patriæ commodum tribuendo,
quam nobis nostrisque Regiis antecessoribus ap-
probantibus, gesta fuere; benignè statuimus
non solum servitiorum quæ hætenus egregiè
præstiterunt, memoriam retinere, sed etiam eos
ulterius excitare et animare, hæc facta pro-
sequi et repetere, quæ nobis nunc placet remu-
nerare, durabilem et insignem regii nostri fa-
voris characterem conferendo, in fidelissimum
nostrum Conciliarium Dominum Archibaldum
P Campbell,

Campbell, fratrem germanum Joannis Ducis de Argyll, ejusque heredes postea expressos, qui numeribus sibi hætenus commissis fideliter et diligenter functus est: Noveritis igitur nos, tanquam solus author et fœdator honoris, fecisse, constituisse et creasse, sicut nos per has nostras patentes literas facimus, constituimus et creamus, dictum Dominum Archibaldum Campbell, Comitem, Vicecomitem, et liberum Parliamenti Dominum, intitulandum et designandum Comitem et Vicecomitem de Islay, et Dominum Oransay, Dunoen et Arroise, omni tempore futuro. Dando, concedenda et conferendo dicto Domino Archibaldo Campbell, et heredibus masculis ex sua corpore procreandis, titulum, honorem, ordinem, gradum et dignitatem Comitis, Vicecomitis, et liberi Parliamenti Domini, ut dictum est, cum plenaria admodum potestate et auctoritate illi ejusque antedictis, eundem cum omnibus et singulis prærogativis, præcedentiis, præeminentiis, et privilegiis eo spectantibus possidere et frui, quibus cum nos eundem Dominum Archibaldum Campbell ejusque antedictos nobilitamus et investimus,

spe-

speciatim vero cum libero suffragio in par-
liamento. Tenend. dictum honorem, ordinem,
dignitatem, et gradum Comitatus, Vicecomitis,
et liberi Parliamenti Domini, cum omnibus
prærogativis, præeminentiis, et privilegiis eo-
spectantibus, per eundem Dominum Archibaldum
Campbell ejusque antedictos, de nobis nostrisque
Regis successoribus in omnibus parliamentis,
ordinum conventibus, generalibus consiliis, aliis-
que congressibus quibuscunque, publicis seu pri-
vatis, in dicto regno nostro tam plenarie adeo-
que libere in omnibus respectibus quam quovis
alius Comes, Vicecomes, et liber Parliamenti
Dominus simili titulo, honore et dignitate, cum
universis privilegiis aliisque ei spectantibus u-
sus et gavisus est, seu quovis tempore præte-
rito, presenti vel futuro uti et gaudere pote-
rit. Leoni porro armorum Regi ejusque fra-
tribus faccialibus imperamus, ut præfato Do-
mino Archibaldo Campbell, nunc Comiti de
Islay, talia prioribus insigniis ejus gentilitiis
additamenta, qualia hac occasione expediens et
conveniens videbitur, dent et præferbant. Et
declaramus et ordinamus hæc nostras patentes
D
P 2
literas,

literas, magno nostro sigillo munitas, adeo validas et efficaces fore dicto Domino Archibaldo Campbell, ejusque antedictis, pro possidendo prædicto titulo, honore et dignitate, ac sic cum omnibus ritibus et solemnitatibus, similibus occasionibus per prius usitatis, ille ejusque investiti et inaugurati essent; quocirca dispensavimus perque præsentis in perpetuum dispensamus. In cujus rei testimonium, præsentibus magnum sigillum nostrum appendi mandavimus. Apud aulam nostram de Kensingtoun, decimo nono die mensis Octobris, anno Domini millesimo septingentesimo sexto, & anno regni nostri quinto.

*Per signaturam manu S. D. N. Reginae,
suprascriptæ.*

DIPLOMA of a Lord of Parliament.

CAROLUS, Dei gratia, Magnæ Britanniae, Franciæ et Hiberniæ, Rex, fideique defensor; omnibus probis hominibus suis ad quos præsentis literæ pervenerint, salutem. Sciatis, quia nos considerantes dilectum nostrum
Dominum

Dominum Jacobum Sandilands de St. Monance, militem, ejusque predecessores præclaros et illustres viros ac probos et fideles subditos illustrissimis nostris progenitoribus esse et fuisse, et multa præclara obsequia et servitia nobis et nostris præclarissimis predecessoribus Regibus Scotiae eternæ memoriæ in eorum emolumentum ac reipublicæ dicti regni nostri incrementum omnibus temporibus retroactis, tam tempore pacis quam belli, præstitisse. Et nos e regia nostra et gratiosa beneficentia volentes animum addi dicto Domino Jacobo Sandilands ad insistendum vestigiis illustrorum ejus prædecessorum, quoad servitia et obsequia nobis et posteris nostris præstanda, conferendo in eum titulum, dignitatem et ordinem subscriptam, tanquam specialem tesseram regii nostri favoris, cum dictus Dominus Jacobus ex antiqua et splendida familia de St. Monance oriundus sit, cui pro præsentē luculentæ opes suppetunt ad obeundum et fovendum ordinem et gradum Domini, infra dictum regnum nostrum omni tempore futuro. Igitur pro diversis aliis magnis respectibus, causis et rationibus, nos moventibus

ventibus, ex auctoritate nostra regali et potestate regia dedimus, concessimus, et disposuimus, tenoreque presentium damus, concedimus, et disponimus memorato Domino Jacobo Sandilands, ejusque hæredibus masculis ex corpore suo legitime procreatis, seu procreandis, Titulum, Nomen, gradum, locum, honorem, dignitatem, et nobilitatis ordinem, Domini, ac damus, concedimus, volumus, decernimus et ordinamus, quod ille ejusque hæredes et successores prædicti indigentabuntur, designabuntur, vocitabuntur et nominabuntur Domini de Abercrombie, omni tempore futuro, cum loco et suffragio in omnibus publicis et privatis conventibus, parliamentis, similiter adeoque liberè in omnibus respectibus sicut quicumque alius liber Dominus aut Baro Parliamento infra dictum regnum nostrum; una cum omnibus privilegiis, dignitatibus et immunitatibus quibuscunque ad similem locum spectant, et pertinent. Cum potestate memorato Domino Jacobo, ejusque hæredibus masculis antedictis, gaudendi et fruendi dicta sita, loco, ordine, honore et dignitate Domini, omni tempore futuro; cum omnibus

præce-

præ
muni
peten
nostr
aliisq
vatis
endi
loci,
sicut
et po
quodq
redes
nentu
perpe
agno
Dom
tur.
magn
apud
bris,
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precedentiis, præeminentiis, privilegijs, immunitatibus, aliisque commoditatibus, eo competentibus, in omnibus nostris et successorum nostrorum parliamentis, conventibus, consiliis, aliisque locis, vel actionibus quibuscunque, privatis seu publicis, ac utendi, gaudendi, et fruendi jure suffragii, prærogativæ, gradus et loci, ac status Domini et Baronis in omnibus, sicut quicumque alius ejusdem status gavisus est et possedit, aut de præsentis possedit et gaudet; quodque dictus Dominus Jacobus, ejusque hæredes masculi, et eorum singuli, successive designentur et indigentur Domini de Abercrombie perpetuo; utque sic reputentur, habeantur et agnoscantur, ac omni honore et reverentia Dominis Parliamenti competentibus afficiantur. In cujus rei testimonium, præsentibus, magnum sigillum nostrum apponi præcepimus, apud Carisbrook, duodecimo die mensis Decembris, anno Domini millesimo sexcentesimo quadragesimo septimo, et anno regni nostri vigesimo tertio.

ROLL of the Parliament 1471.

Die vero xviii Februarii.

*Præsente dicto Supremo Domino nostro REGE,
una cum Episcopis, Abbatibus, Prioribus,
necnon Nobilibus, Ducibus, Comitibus, Domi-
nis, Baronibus, Libere-tenentibus ac Bur-
gorum Commissariis subscriptis, viz.*

Alexandro Duce Albanie, &c.

EPISCOPIS

*Dunkelden,
Aberdonen,
Rossen,
Orchadeny.*

PRIORIBUS

*Portmowok,
Rostinot,
Coldinghame,
Mae.*

ABBATIBUS

*Aberbrothoc,
Melross,
Haliruidhouse,
Pasleto,
Scona,
Driburgh.*

COMITIBUS

*Cancellarius,
Errol,
Mersbell,
Huntle,
Crawfurd.*

COM-

COMITIBUS.

Mortoun,
Ergile,
Rotbes,

DOMINIS

Innermeth,
Erskin,
Haliburton,
Setoun,
Borthwic,
Dernle,
Lindisfay,
Gray,
Forbes,
Kilmawrs,
Kennedy,
Hamiltoun,
Monypenny,
Saltoun.

BARONIBUS

Sanquhar,
Bewfort,

Haltoun,
Craigmiller,
Lestalrig,
Dundas,
Bargany,
Bass,
Caldor,
Luss,
Tariglis,
Elzetstoun,
Ruthven,
Sauquby,
Elphinstoun,
Guthrie,
Tortborwald,
Corstorphin,
Edmunstoun,
Dalwolsy,
Bothiok,
Petarrow,
Abyrcrumby,
Erolet,
Rusky,

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BARO-

BARONIBUS

COMMISSARIIS

*Carns,
Cranston,
Halkerstoun,
Boyle,
Ker,
Gask,
Dron,
Hume,
Balcolmy.*

*Edinburgh, { Zong,
Boncle,
Aberdeen, - Knows,
Stirl. Walter Stewart,
Linlichgw, { Fowlis,
Forrest,
Haddingtoun, Girnlaw,
Dumfries, - Welch,
Are, - - Multrar,
Dundee, { Monargund
and
Mal. Gutbre,*

ESSAY

ESSAY IV.

Upon SUCCESSION *or* DESCENT.

INTRODUCTION.

SUCCESION, or the Transmission of Estates from the Dead to the Living, is a Subject which makes a great Figure in History, as well as in Law. It is a Subject full of Curiosity; for, depending mostly upon remote Principles of the Imagination, it shows, in a Multitude of Instances, how much we are governed by Feelings, which, abstractly considered, appear to be of the weakest Sort. One Effect of this indeed is, that there is no such Thing as universal Rules of Succession. Different Maxims are not only embraced in different Countries, but have been established in the same Country at different Periods: So that Succession, like the Fashion, has hitherto been in a constant Fluctuation. We are apt to think, that the Rules are now ultimately settled without Fear of Change. But so, in all Probability, did our Fore-fathers, three or four Centuries

ago ; for 'tis a common Mistake, from any short Specimen, to infer a constant Uniformity. However this be, 'tis of great Use to trace the Rules of Succession through their different Changes. A Lawyer possibly may think his Stock of Knowledge sufficient, if he can point out the Rules which obtain at present in his own Country. But a Man who knows no more of the Matter, cannot form any clear Judgment about many old Transactions of the greatest Importance. In the History of *England*, of *France*, of *Scotland*, and indeed of most *European* Nations, we meet with frequent Disputes about the Succession of Kingdoms, and of other Sovereignities, which we are altogether at a Loss to comprehend, because such Disputes cannot exist at this Day. Who imagines that a second Son or Daughter can have any Pretensions to a Crown, so long as there are Issue existing of the eldest : Yet this very Thing was made a Question of in the famous Trial about the Crown of *Scotland* betwixt *Bruce* and *Baliol*. We are apt to imagine, that a second

cond Son, who puts in so idle a Claim, has other Arguments to support himself with than what are founded in the Laws of his Country: not considering that the Right of Representation, tho' now generally established, was but creeping into Practice in those Days. In former Ages the Right of Representation was not so much as dreamed of; Witness *Lewis*, the second Son of *Charlemain* called to the Succession of the Crown of *France*, when there was an elder Brother's Son existing. Instances of this Nature, and there are Multitudes of them, make it evident, that it is a necessary Qualification in a Historian to be acquainted with the Laws and Antiquities of the Country he writes of. Is it not surprising, that Father *Daniel*, in his History of *France*, gives the above Account of the Succession of *Charlemain*, without making the least Reflection upon it, as if it were an ordinary Event, which needed no Comment? So dry an Historian cannot fail to perplex his Readers. Perhaps the Father was himself perplexed, and chose to hide his Ignorance by

his Silence. *Rapin* is a most judicious Historian, but he is frequently at a Loss, thro' want of a sufficient Knowledge of the Constitution of *England*. In his History are introduced many disputed Successions, where the Facts are stated with great Accuracy. But an intelligent Reader will perceive, that he is generally at a Loss when he endeavours to form a Judgment upon the Point of Right, which must be the Case with an Author who is not intimately acquainted with the Notions of Succession entertained in the Age, and in the Country he writes of. The following Account is therefore given with a View to answer the Purposes of History as well as of Law.

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P A R T I.

AFTER Property was introduced, and had gained a firm Establishment, the Matter of Succession could not be long neglected. The Death of the very first Man who acquired Property, must have given Occasion to the Question, who was to succeed him? If his Will was declared upon the Point, no Doubt could be that it was the Rule (a). If the

(a) The Author is aware, that while Property was in its Infancy, it was doubted whether a Man's Will, in whatever Manner declared, could have the Effect to regulate his Succession. But when the Thing is attended to, it will be found to resolve into a Dispute about the Nature of Property. Occupation is allowed to have been the first Foundation of Property in Land. When a Piece of Ground was taken out of the Common, and cultivated by the Occupier for the Use of himself and Family, it soon came to be settled, that this Person was to have the undisturbed Possession for his Life; otherways farewell to Labour and Industry. But as his Interest in the Subject behoved to die with himself, it was not readily conceived how his Power over the Subject should continue after his Interest was at an End, or at any Rate subsist after he was dead and gone. But this Difficulty was plainly owing to the limited Notion of Property, which was entertained after its first Introduction. In early Times Property was not much distinguished from what is now called *usufruct*. No more was conceived in Property, but

the Estate was left *in medio*, without a Will to direct the Succession, his Children for whom he was bound to provide, would naturally be suggested to the Mind. This pointed out the primary Rule of Succession, that Children succeed *ab intestato*. But what if there are no Children? 'Tis but following out the same Rule to pitch upon the nearest Relation. For after a Man's Death, his Children

but the unlimited Use of the Subject. But Experience pointed out a more extensive Idea of Property. Mankind are fond of Power, especially over what is their own; and it came to be considered as an unreasonable Hardship, after Industry bestowed in acquiring and improving a Field, that the Occupier should not have it in his Power to dispose of it at his Pleasure. The Power of Disposal was relished, and became Law, because it was every one's Interest that it should be Law. And when once this Power was understood, it came by Degrees to be extended the utmost Length it was capable of. Thus Grotius, *Lib. 2. Cap. 6. Sect. 14. Possum enim rem meam alienare non pure modo sed et sub conditione; nec tantum irrevocabiliter, sed et revocabiliter, atque etiam retenta interim possessione et plenissimo fruendi jure. Alienatio autem in mortis eventum, ante eam revocabilis, retento interim jure possidendi ac fruendi, est testamentum.* Therefore, when we read of ancient Laws among particular Nations, introducing the Power of making a Testament, we must not consider these Laws as bestowing peculiar Privileges, but only as authorising a Practice which was the Consequence of an enlarged Idea of Property.

or other Relations, will be considered as having a closer Connection with his Effects than Strangers; and, by a natural Transition of Ideas, the Property, that was in the Deceased, will be readily transferred to his Kindred.

CHILDREN, as having the closest Connection, come to be considered in the first Place; and here a subtle Question occurs, Whether, by the Law of Nature, Daughters are intitled to succeed equally with Sons? One Thing is clear, that wherever the Notions of a Family have got firm Footing, Female Succession must be excluded, since a Woman by Marriage making a Part of her Husband's Family, cannot readily carry on the Idea of that of her Father. But the Notions of a Family are the Consequence of a Male Succession, and are not suggested by any natural Principle. If we lay aside the Notions of a Family, Propinquity must also be laid aside, which throws an equal Weight into either Scale. What readily occurs after this, to determine the Question, is, that Women stand in Need

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of Food and Raiment as well as Men do, and are equally capable of enjoying Riches. It is true, that the Male has among all Nations, and at all Times, been esteemed the *dignior persona*. But this Consideration can never be of Weight to thrust out Females altogether, and once admitting them into a Share, they must have an equal Share, as there are no possible *Data* in this Case to fix any other Proportion.

ACCORDINGLY we find this Rule observed among all Nations, with regard to Succession in Moveables. In most Countries Females have been excluded from succeeding to Lands. But this was the Effect of distinguishing Mankind into Tribes and Families, which tho' not original in Nature, crept pretty early in. It was evidently so among the *Jews*, and among the *Romans*, where the Distinction betwixt Tribes and Families was so remarkably preserved, that by Law a Person of one Tribe could not succeed to one of another. And in other Countries where these Distinctions

were not so much attended to, War in early Times being the principal Occupation, and Land the principal Object of Conquest, it was natural that Males only should have the Possession of Land, which they only could defend. But even in this Case, it must be observed, that the whole Sons succeeded equally, which was departing as little from the Law of Nature, as the Circumstances of the Case would allow.

THE Right of Primogeniture was a Creature of the Feudal Law. The Possession, not the Property of Land, was given for personal Service; and when it came to be the Practice to extend such Grants in favours of Children, the Master or Superior having no Claim but to one Man's Service, the eldest Son came readily into the Father's Place. For as in tracing out a Family, the Mind descends by Degrees from the Father, first to the eldest Son, and so downwards in the Order of Age; the eldest Son, where but one can take, is the first who presents himself. And as the

Feudal Law gained Ground, and spread itself over all *Europe*, the Right of Primogeniture came by Degrees to be a general Rule in the Succession to Land Estates, which were held by military Service.

As this was evidently the Reason for preferring the eldest Son in a military Feu, the same Reason, in my Apprehension, behoved to take Place in Burgage Lands, which being given for the Service of Watching and Warding, if one only was bound to perform the Service, the eldest Son was the Person. But Soccage Tenure stood upon a different Footing. Where the Possession of Lands is given to a Man, not for personal Service, but upon Condition of delivering to the Master yearly a certain Quantity of Corn, or of other Fruits, which are the Produce of the Ground, there appears no good Reason why the Benefit of such a Contract, if there is any Benefit from it, should not accrue to all the Family equally. And yet, so far as we can discover, Sons were always preferred to Daughters in
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the Succession of Soccage Lands. All I have to suggest is, That in Times of Ignorance and Barbarity, when Strength of Body and personal Courage are the only Virtues, Women are little regarded. And the Practice of debarring them altogether from Succession to military Feus, which made the Bulk of the Property of the Nation, did probably pave the Way for preferring the Males to the Succession of other Estates. This Conjecture appears natural enough; but it is more difficult to be explained, by what Means it has happened, that the equal Succession of Males in the Soccage Tenure has gone quite into Disuse, and given Place to the Right of Primogeniture. This Revolution is not taken Notice of by our Historians, nor accounted for by our Lawyers. One Thing is certain, that Equality among Males, in the Descent of Soccage Lands, was in Vigour so late as the *Regiam Majestatem*. See *R. M. L. 2. C. 27*. We must venture another Conjecture here. After the Days of *David II.* during whose Reign the *Regiam Majestatem* was composed,

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peaceable Times brought on new Manners, Riches came to be in greater Request than military Prowess, and many Superiors were willing to take Rent in Place of Service. This in some Measure, confounded the Distinction betwixt Military and Soccage Tenures, so as by Degrees to make one Rule serve for the Succession in both. And as Military Feus were by far the most frequent, the Right of Primogeniture, which took place in most Cases, became at last universal.

BUT we are not yet at an End with the Difficulties which arise from this Branch of our Subject. Tho' the Succession to Soccage Lands came after this Manner to be confined to the eldest Son; yet no Alteration was made in the Female Succession; Females continued to succeed all equally, and do so at this Day. This at first Sight must appear whimsical, and not readily to be accounted for. If the Right of Primogeniture was so universal a Principle, how came it to stop short, and not to obtain in every Case? And 'tis evident, where there
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are Daughters only, that the Mind, in tracing out the Line, descends to the eldest, as naturally as to the eldest Son, where there are Male Issue. Among the many Grounds of false Reasoning, there is not one more common, than from some slight or accidental Relation to form an Analogy betwixt two Things that are very different in other Respects. The bad Effect of which is, that the Mind, intent to compleat the Analogy, has a Tendency to render them equal in every Circumstance. 'Tis probable, that the Socage Tenure was not far behind the Military Tenure in Point of Time; and if so, the Rules of its Succession were settled before the Right of Primogeniture came to take such fast hold of the Mind, as to be reckoned a Sort of natural Principle. Accordingly we find, that tho' Males were preferred, yet in other Respects the Law of Nature took Place, by calling the Males all equally; and failing them, the Females. But this Circumstance we must attend to, that tho', in Progress of Time the Right of Primogeniture came to be established as a general Law,

Law, and in some Sort as a natural Principle; yet there was no Example of this Right taking Place, except among Males. It was this very Consideration, in all Appearance, which led our Forefathers, in their superficial Reasonings, to lean to the Right of Primogeniture in all Cases of Male Succession, without thinking of encroaching upon the established Rules of Female Succession. Not at all attentive to what is fundamental in this Matter, in the *first* Place, that the Right of Primogeniture depended upon the Nature of the Military Holding, which therefore could not with any Shew of Reason be extended to Holdings of a different Kind; And, in the *second* Place, That if the Privilege of Primogeniture was to be the sole Rule, it ought to have Place in the Succession of Females, as well as of Males.

AFTER the Feudal Law came to a Standard, the Succession in Military Feus was regularly extended to the Male Descendents of the original Vassal, and after these were all

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exhausted, the Fee returned to the Superior. There was no Place for collateral Succession. It might happen, that Collaterals to the deceased Vassal did succeed, but it was not as Collaterals, but as Heirs-male of the Body of the original Vassal. See *L. 2. feud. T. II.*

IN handling a Subject, where we have so few Principles to direct us, and where these Principles are not of the firmest Sort, 'tis no Wonder that Difficulties crowd in on every Side. So far we have proceeded upon a reasonable Foundation, that in the Succession of Military Feus, Preference is given to the eldest Son. But now the Question is, Whether this Privilege is to be extended to his Male Issue? A Military Vassal dies leaving Issue a younger Son, and a Grandson by his eldest Son, the Doubt is, Whether the Son or Grandson is Heir: The Son is undoubtedly the next in Blood, and therefore, by the Law of Nature, ought to be preferred; and accordingly this appears to have been the Law in the Days of *Charlemain*, whose second Son

Lewis was called to the Succession as lawful Heir, tho' *Charlemain* had by his eldest Son a Grandson of perfect Age, when the Succession opened. On the other hand, the Circumstances of the Grandson are to be considered. He is born, and perhaps educated, with the Prospect of succeeding to the Estate, after the Death first of his Grandfather, and then of his Father. It cannot but be considered as a Hardship to be deprived at once of all his Hopes, by the unexpected Accident of his Father's Death before that of his Grandfather. Such are the Circumstances which weigh against one another; and therefore no Wonder to find the most sensible Writers taking different Sides in a Question so dubious. Perhaps there is not one Question in Law, which has afforded a greater Field, not only for Law-suits, but for bloody and cruel Wars. The Historians of *France* and *England* are full of Instances of this Kind. And the celebrated Struggle about the Crown of *Scotland*, betwixt *Bruce* and *Baliol*, had no other Foundation. *Baliol* was descended of the eldest

Sister, *Bruce* only of the second. But then it was urged in Behalf of the latter, that he was one Degree nearer to the common Stock than his Competitor, and consequently nearer in Blood. This Matter is now settled, and has been for Ages in favours of the Descendants of the eldest. But it was in some Measure reckoned a doubtful Case, even so late as the Time when the *Regiam Majestatem* was composed, as will appear from the 33 Chapter of the second Book.

It has been disputed, whether the same Rule ought to hold in the Succession of Collaterals. The Ground of the Doubt is, That as a Man is never without Hopes of Issue, none of his Collaterals can be born or educated with the Hopes of succeeding to him: This Circumstance being removed, which preponderates in the former Case, it may be thought, that there is nothing to weigh against the Right of the nearest Agnat. Upon this Ground it was, that after the Death of *Henry III.* of *France*, the League set up

the Cardinal of *Bourbon* as Heir of the Crown, against his Nephew the King of *Navarre*, afterwards *Henry IV.* For tho' *Henry* was the Son of the elder Brother, yet the Cardinal the younger Brother was one Step nearer to the common Stock. It is extreme probable, had Cases of this Nature first occurred, that the nearest Agnat would have been preferred; and it is equally probable, had this once been established as the Rule, tho' occurring only in collateral Succession, that it would have been applied to the Case of Descendents, without Regard to their Hope of Succession. But Instances first occurring, as readily would happen, in the Case of Descendents, the Decisions given in favours of the eldest Son's Descendents, established a Sort of general Rule, which was afterwards applied to the Case of Collaterals.

Thus we see after what Manner the Rules of Succession have been established, not only from very slender Circumstances, but in some Measure from Accident. Had the above
Question

Question first occurred in collateral Succession, probably we should never have heard of this Privilege given to Descendents, which Lawyers call the Right of Representation. But as this Privilege has been first established in favours of Descendents, it has been considered as a general Rule, and applied to the Case of Collaterals, tho' without the same Foundation. But this will not be thought strange, when it is considered, how strong a Propensity there is in our Nature to act by general Rules, without regard to the Variation of Circumstances.

AND here we are furnished with an Opportunity to consider a peculiar Sort of Argument, the great Resource of Lawyers, when they are pressed with Difficulties upon any Subject. Cases often happen where a general Rule will not apply, and where it is necessary to make a particular Rule to govern such Cases. But as Mankind are addicted to general Rules, and as the Indolence of Lawyers makes it a Task too hard for them to

to trace out all the Rules which govern particular Cases, they have invented an easy Method to bring all the Exceptions under the general Rule ; which is by supposing the Fact to have happened otherways than it did. And this they justly term a *fiçtio juris*. Thus for Example, in the *Roman Law*, a Citizen who was taken Captive by the Enemy, lost the *jus civitatis*, and all the Privileges attending it. This was a general Rule established among them. But supposing the Captive to have made his Escape, or to have recovered his Liberty by some other lucky Accident, it would have been an Hardship intolerable, that this Man without a Fault should be forfeited of all his Rights and Privileges. The Rule, 'tis evident, could not be extended to this Case. But what was to be done ; for Lawyers were loath to part with a general Rule? Instead of making a Rule for Cases of this Nature, they extricated themselves out of the Difficulty, by supposing forsooth, that this Man had never been out of the City ; and this is called the *jus postliminii*. The *Roman*

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Law is full of such Fictions, and the Moderns their humble Imitators, have followed them but too close. Thus, upon the Subject under Consideration, it is justly established as a general Rule, that the next in Blood succeeds. The Privilege which is given to the Descendents of the next in Blood, who dies before the Succession opens to him, is obviously an Exception from this general Rule. But to supply this Defect in the Rule, the Descendent is supposed by a Fiction of Law, to come in Place of the Deceased, to be as it were the same Person with him, and intitled to claim the Succession, as he could have done had he been alive. Let us hear our Countryman Craig upon this Fiction. *Jus repræsentationis est, quoties posterior non ex sua, sed ex prioris persona, quam repræsentat, jus successionis petit, veluti præmortuo filio cum nepos aut neptis ad successionem vocantur; non enim ratione sui, sed patris eorum, i. e. filii defuncti, Successio ad eos pertinet, neque hi ex sua persona hæreditatem aut ejus partem possunt petere, sed tantum ex persona patris (nam ex sua*

sua non admitterentur, cum filii ex eodem parente supersint, qui horum sunt patru, et sic agnati propiores defuncti;) et hoc est ejus personam representare. This, as has been observed, is a very commodious Method of solving Difficulties. But however commodious, I will venture to say, it affords little Satisfaction to the Mind. For the Question still recurs, Where is the Foundation of this Fiction? Why should there be a Right of Representation in Lands more than in Movables? To say no worse of it, it seems, in my Apprehension, to signify nothing but to darken instead of clearing the Subject Matter. Is it not more natural, and almost as easy to set forth in plain Terms the Hardship it would be upon the eldest Son's Descendents, to be cut out of their Hopes of Succession by the premature Death of their Father; and that this Consideration in such Cases prevails over the Right of Propinquity.

It remains only to be observed upon this Head, that, pursuant to the above Plan of
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Succession, three general Rules behoved to be established with regard to military Feus.

1^{mo}, That the eldest Male is the Favourite of the Law, and preferred to the Succession. 2^{do}, That the Estate gradually descends from the elder Brother failing Issue, to the younger Brothers. And 3^{tio}, That it descends to every one of the Male Issue of the elder Brother, before it comes to the younger Brother or his Issue.

THO' such was the common Course of Succession in military Feus, which in Time came to be looked on as Part of the common Law of the Land, we need not doubt that it was often broke in upon by special Appointment. In strict Law the Vassal's Right is but an *Usufruct*, and it was late before he was considered as Proprietor. The Superior therefore behoved to have a great Sway in chusing an Heir for his Vassal; especially in early Times, before Feus were regularly extended to Heirs. That Sop, without Regard to Primogeniture, who had shown himself

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most

most active in War, would often be preferred. And even in after Times, when Succession in Feus was more firmly established, Examples could not be wanting of setting aside the eldest Son, because of Defects in Body or Mind; or perhaps because he was intended for the Church, or addicted to the Arts of Peace. This gave a Beginning to Entails, by altering the Order of Succession, and preferring a younger Son and his Male Descendents to the elder Sons and their Descendents.

BUT, now supposing that a younger Son, thus pitched upon to serve the Superior in Place of his Father, dies without Male Issue, the Question is, who is his Heir in the Feu, his elder Brother or his younger. Perhaps there will not be found in Law a Speculation more curious than what this Doubt gives Rise to. Let us examine attentively what Things occur upon this Subject. As 'tis probable from the Circumstances of the Times, that Examples of such Entails were frequent, even in the Infancy of the feudal Law, we cannot
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well suppose, that the Rules above laid down, touching the Succession to military Feus, were very firmly established, when there was first Occasion to determine the Point under Consideration. But supposing these Rules to be firmly established, it must have been obvious, at first View, that they did not apply to this Case. The Right of Primogeniture and the gradual Descent, relate only to the Father's Succession, and go no further than to ascertain, that where a Man dies *intestate*, his Estate goes first to the eldest Son and his Issue; whom failing, to the second Son and his Issue, and so downwards. But there is nothing in this Regulation, where a Man dies without Issue, to determine who shall be his Heir, his elder or younger Brother. These Rules therefore must be laid aside, as of no Use to support the elder Brother's Claim. On the other Hand, the Will of the Superior or Father, in excluding the eldest Son does not operate in Favours of the younger, since it goes no further than to prefer the second Son to the eldest, by no Means to pre-

fer the third Son. And at any Rate laying aside the eldest Son, because of his Unwillingness or Incapacity, an Exclusion which is founded merely on personal Considerations, cannot be extended against his Male Issue.

THESE Points being discussed, one Thing occurs in Favour of the elder Brother. In order to ascertain the Propinquity, it is natural to cast about for the Principle which connects the Brothers together, and this is their Father. When we have carried our Thoughts to him, we naturally descend to the eldest Son, as the first Step in the Progress of the Mind through the Family. And thus, as the eldest Son comes next in View, after the connecting Principle, it will not be strange, in a cursory View of the Matter, to prefer him as a Step or Degree nearer to the common Stock than his Competitor is. I shall have Occasion to show hereafter, that this Way of thinking has had its Effect in another Case of Succession. But, as here, Custom has given the Preference to the younger
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Brother, there must be some other Principle in our Nature, or some Peculiarity in our Way of thinking, sufficient to over-balance that now suggested. For Things established merely by Custom, without the Influence of external Circumstances, must certainly have a Foundation in Nature.

In searching about for this Principle, let us premise one Reflection. It will not be thought strange, that the Rules of Succession, which depend upon the natural Connections betwixt Persons, are, like these Connections, founded upon remote Principles; Principles which at first Sight, may appear of little Weight, which are little attended to, and which notwithstanding, have their Effect by influencing the Mind. And now to our Subject; in order to explain which, we must take a pretty large Compass, being to treat of Things which are not commonly reflected on. In tracing out the Actions of our Mind, the following Observations will be found just. *1mo*, In the Conception of Objects,

jects, which are real and existent, we take them in their proper Order and Situation, and never leap from one to another which is distant, without running over, at least, in a cursory Manner, all the interposed Objects. Whether this be a natural Principle, or the Effect of Habit, does not belong to the present Subject. I shall only observe, that the progressive Motion, through the Points of Space, of all moving Bodies, is sufficient to bring on a Habit, and to accustom the Mind to the like progressive Motion in surveying its Ideas. 2do. After the same Manner we always follow the Succession of Time in placing our Ideas, and cannot easily be brought to contemplate an Object distant in Point of Time, without running over the intermediate Objects. 3tio, As the Tendency of all Bodies is to move in a streight Line, and in one Direction, as Nature is going on in its Course without any retrograde Motion, this Tenor of Things about us, communicates to our Minds the like Tendency: However this be, it is certain, that we more readily

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pass to the Contemplation of a future Object, than of one that is past. The Progression of the Thought, in going from a present to a past Object, has a disagreeable Feeling, as if we were walking backward. But when we turn our Thought to a future Object, our Fancy flows along the Stream of Time, and arrives at the Object, by an Order which seems most natural, passing always from one Point of Time to that which immediately follows it. 4th, The Tendency of Bodies downwards, continually operating upon the Senses, must produce from Custom a like Tendency in the Fancy. Upon this Account the Mind finds a Difficulty in mounting from inferior to superior Objects, as if Ideas acquired a Kind of Gravity from their Objects. 5th, The Progress of Thought to Objects past and future, having similar Feelings with the Progress to Objects situated above and below us, these Feelings are commonly taken for the same. Hence we imagine our Ancestors to be in a Manner mounted above us, and our Posterity to be below us.

THESE

THESE Observations will give Light to our Subject. Let us recollect, that it is the Estate of a middle Brother which is in Dispute. If we turn our Thoughts to the elder Brother, the Mind feels some sort of Pain, as if it were ascending. It is a sort of retrograde Motion, contrary to the Course of Nature. On the other hand, passing to the younger Brother is going with the Current, it carries with it the Facility of descending. These Things weigh in favours of the younger Brother. The Transition of the Thought to the younger being more easy than the Transition to the elder, gives an Impression of a closer Connection or Relation betwixt the second and third Brother, than betwixt the second and eldest. For 'tis a Law in our Nature, that the Connection among Objects is ever considered to be in Proportion to the Facility of the Transition of our Ideas from the one to the other.

It will perhaps be observed, That Principles like what I have been tracing out, which

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at best, make but a slender Impression, are little to be relied on, in our Reasonings upon any Subject. I readily yield, that in resolving the present Question, no Man would hesitate a Moment to divide the middle Brother's Estate betwixt the elder and younger, as the equal Method. But what forces us, perhaps reluctantly, into an abstract Speculation, is the Nature of a Military Feu, which does not admit of a divided Succession. When we are so hemmed in, we must extricate ourselves the best Way we can. A Decision must be given, for the Competitors are calling out to have Justice done them. And however slight this Principle may appear, I must observe, that it has had Weight enough among our Forefathers to preponderate the Consideration above suggested, which weighs for the elder Brother. At least, I will take it for granted, that this is the Principle, till I hear of another capable to make a stronger Impression.

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AND

And thus a fourth Rule came to be established in the Succession of Military Feus, that its Course is ever to descend, never to ascend.

To proceed to other Matters, I have explained above, one Effect of bringing Land into Commerce, which is that of introducing Primogeniture into all Sorts of Holdings: I shall now take Notice of other Effects of this Innovation still more remarkable. The Feudal Law was an Institution adapted intirely to War, admirably contrived for that End. But it was an utter Enemy to Labour and Industry, and even, among an indolent People, scarce sufferable in peaceable Times. Such an Institution could not be long-lived. According to the Circumstances of the Times, and Humours of the People, various Changes were introduced in different Countries, all of them tending to correct its Harshness, and to soften it down to a more peaceable Temperament. It is quite wore out in several Places and even where it subsists, it is reduced to a Shadow. As Land is one of the most desirable

rable Objects, the Feudal Law was most unnatural in this Respect, that the Property of Land was altogether withdrawn from Commerce, and scarce any Means to come at the Possession and Use of it, but by military Service. The Hardship was not much felt in Times of War : But after the Arts of Peace began to be cultivated, Manufactures and Trade to revive in *Europe*, and Riches to encrease, this Institution behoved to become extreme burdensome. It first tottered, and then fell by its own Weight, as wanting a solid Foundation. All Parties conspired against it, even these who were most interested to support it. Superiors began to find, that they could make more of their Lands than by allotting them for military Service. They were willing to change this Service for Rent, and the Tenants turning themselves to Industry, or at least fond of Independency, were pleased with the Exchange. Other Superiors, to supply Means for Luxury, and tempted with a Price, were willing to give off detached Pieces of Land. And thus, by Degrees,

Lands returned to their original Condition of being the principal Subject of Commerce.

THIS behoved to introduce some new Regulations with regard to Succession. A Man who gets Lands as a Gratuity, or the Ufufuct of it, in Name of Wages, may reasonably be confined within the strictest Bounds. But he who purchases Land, and pays a full Price, proposes to have it under his own Management, and at his own Disposal. He proposes particularly, when he dies, that it shall go to his Heirs without Limitation. And the Person who aliens, supposing him to retain the Superiority, finds it his Interest to agree to those Conditions, since upon that Account he gets a greater Price for the Subject. Perhaps this was not provided for in the first Purchases which were made. People who have Money to bestow, will take Land upon any Terms rather than want. But as the Appetite for Liberty and Independency is active and universal, there will always be found Purchasers to pay for these Conveniences ;

cies; and they who stand in Need of Money, will be tempted to dispose of every Thing that can procure it. And thus by Degrees, the Succession to Heirs whatsoever was introduced into Feudal Rights: That is, collateral Succession, properly so called, took Place, which was not formerly known.

FROM this Deduction it will be obvious, that, for a considerable Time, collateral Heirs were only admitted to succeed in Feus purchased with Money, or other valuable Consideration. Military Feus would remain upon their old Footing, exclusive of collateral Succession. And thus the Notion of Conquest came in, as opposed to Heritage, or what came to the Vassal from his Ancestors by Descent. And during this Period there certainly was no Distinction betwixt *feuda vetera et nova*, but betwixt Feus acquired by Purchase, which behoved all to be late, and Feus granted for military Service, which might be either old or new.

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WHEN once this Matter of collateral Succession came to be known, it grew into common Repute, and every Person did aim at it. And as Bargains of all Sorts about Land came into Practice, the mixed Nature of such Bargains, partly onerous, partly gratuitous, did quite confound the Distinction established betwixt a Purchase and a Grant for military Service; and so by Degrees it crept into the Feudal Law, that new Acquisitions of Land, for whatever Cause, did go to Heirs whatsoever. And this behoved to introduce a new Distinction betwixt *feuda vetera et nova*.—Under *feuda nova* were comprehended Feus purchased at whatever Time, and late Feus granted for whatever Cause; in all of which collateral Succession did obtain. Under *feuda vetera* were comprehended all the old Feus granted for military Service, which did only descend to the Male Heirs of the original Vassal. As these old Feus are long ago wore out, this Distinction betwixt *feuda vetera et nova* must be at an End. And now, at least in this Island,

Island, every Land Right goes to Heirs
whatsoever, unless the contrary be speci-
fied.

At what Periods these several Changes in
the Feudal Succession were introduced, is not
certainly known. History does not deal in
such Matters; for Lawyers are seldom Histo-
rians, and Historians as seldom Lawyers.
But as we have Traces of these Distinctions
in our Law-books, tho' obscurely handled,
the Origin of collateral Succession, and its
several Enlargements, do follow so naturally
the Increase of Trade and Riches, that there
is no resisting the Conviction which arises from
the above Deduction. Let us but consider,
that once there was no collateral Succession in
the Feudal Law, and that now it is universal,
not by Statute, but by Custom, and we will
find the several Gradations above mentioned
natural and easy, nay, what must necessarily
have happened by the Progress of Arts and
Sciences, which inspired us not only with a
Taste for Liberty and Independency, but made
Riches

Riches flow in among us, wherewithal to purchase these Blessings.

HAVING opened up the Origin of collateral Succession in the Feudal Law, and the Progress of it thro' its various Changes, with regard to the Subjects in which it did, and does now obtain. I go on to examine who these collateral Heirs are who have a Right to succeed.

LET us suppose a second Brother makes a Purchase of Land, and dies without Heirs of his Body, whereby the Succession opens to his Collaterals, the Question is, whether the elder or younger Brother should be preferred: The Principle above laid down favours the younger, that it is natural for Heritage to descend, and unnatural that it should ascend. Further, this was become a Standard Principle, and constantly applied to give Preference to the younger Brother, in the Succession of Estates devolving from a Father to a middle Brother. And it will be observed, that

that the Principle here ought to have the greater Effect, as acting without a Counterbalance. In the Case of Heritage, where the Estate descends from the common Father, we are apt to turn our Thoughts upon him, from whence they naturally fall upon his eldest Son. This Circumstance has no force against the younger Brother, in the Case of an Estate acquired by a middle Brother; for the Estate being his own Conquest, we are not prompted to look further back. In a Word, if the younger Brother is preferred in Heritage, notwithstanding of a certain Propensity in favours of the eldest, much more ought he to be preferred in Conquest, where there is no such Propensity against him. Yet in Fact the elder Brother is preferred by all Nations who have embraced the Feudal Law. And this will not appear strange, when the Circumstances of Time are attended to. We have a Propensity in our Nature to act upon general Principles, as being easy in their Application, by avoiding Intricacies, which more abstract Reasoning must lead us into. The Right of

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Primo-

Primogeniture was but growing into Fashion when the Rules of Succession in Heritage were settled, and so had not Weight enough to counterbalance a natural Impulse. But by the Time that Land came to be the common Subject of Commerce, the Right of Primogeniture was established as a general Principle, and as the common Law of the Land. Instances of preferring the younger Brother, in the Succession of the middle Brother's Estate behoved to be rare, in Comparison of preferring the elder Brother to the Father's Estate, and such rare Instances making no Figure, in Opposition to the general Rule, the Right of Primogeniture was readily laid hold of to determine this Point. And when the Error is so common of substituting Names for Things, it will be no Surprise, that this was made the determining Rule, tho' in strict Reasoning it does not meet the Case. After the Hint is given, nothing can be more obvious, than that the Cause of preferring the eldest Son to the Father's Succession, does by no Means apply to the Succession of a younger Brother.

BUT we are no sooner extricated out of one Labyrinth, than we are involved in a greater. If a third Brother dies possessed of Conquest, the Succession, by the Law of *Scotland*, goes to the immediate elder, by the Law of *England* to the eldest. What are the Foundations of these different Opinions, and which the most agreeable to Principles, may not be an useless Enquiry. The *English* who got the Start of us in Law-matters, have been guided in the Decision by the Principle of Primogeniture; and indeed, after conferring the second Brother's Estate upon the eldest, moved by this Principle, it was an easy Consequence to confer upon him also the third Brother's Estate. Our People, in the Infancy of their Law, swayed more by natural Feelings, than by general Principles, have judged of this Matter after a different Manner. Beginning at the third Brother whose Estate was in Question, it has been observed, that the Mind in its Progress would pass first to the second Brother, and from him to the eldest. In this Way the second Brother was considered as one

Step nearer to the Deceased than the eldest is, and so was preferred to the Succession.

'TIS probable the Feudal Law was introduced into *Scotland*, before an Opportunity offered of fixing this Point in *England*, otherways it would have come along to us, with their other Feudal Customs. Thus we were left to our own Way of thinking in solving the Problem. And tho' we have determined the Point, by Similitude of Distance and progressive Motion, yet it appears, that some of our Lawyers have reasoned not quite uniformly upon this Subject. The learned *Craig* puts a Case, *L. 2. Dieg. 15. § ult.* It is of four Brothers, three of the first Marriage, the fourth of a second. The fourth acquires a Land Estate, and dies without Issue. Our Author observes, that other Lawyers were for preferring the immediate elder Brother, tho' of a different Marriage; and such, no doubt, at present, is the Law of *Scotland*, whatever Difficulty there might be in the Question before the Rule was established in Practice;

tice; he is for preferring the elder Brother,
“ Because (says he) in the Case of different
“ Marriages, the Connection or Conjunction
“ begins at the eldest, and passes thro’ him to
“ the second and third.” This is obscurely
said, but it is not difficult to gather what our
Author had in View. The Argument, when
brought out to light, is subtle and ingeni-
ous. Where the Brothers are all closely uni-
ted by being of the same Marriage, we feel
an intimate Connection amongst them, with-
out thinking of the connecting Principle. But
amongst Brothers of different Marriages, the
first Idea that presents itself, is rather that of
Difference and Opposition, than of Union.
This forces us when we investigate the Rela-
tion, to cast about for a connecting Principle,
which we find to be the common Parent; and
as from him the first Step is to the eldest Son,
we conceive this Son to be one Step nearer
than the second, and two Steps nearer than
the third.

WHEN

WHEN the Matter of Succession depends upon such remote Foundations, and upon such slight Feelings, 'tis no Wonder the Customs of different Nations should be so different, and that there should not even be any uniform or consistent Plan of Succession in the same Nation ; And indeed ours, in particular, is far from being uniform. Another Mistake has crept into our Law, and into all our Law-Books, less excuseable than any above suggested. Let us recollect the Distinction mentioned above, betwixt *feuda vetera et nova*. In the first Class were the old Feus established upon the Footing of military Service, where the Succession was confined to Male Descendents of the original Vassal, and which consequently behoved gradually to descend ; and could never ascend. The other Class comprehended Purchases, and all late Feus granted for whatever Cause, which went to Heirs whatsoever. In these, when the Succession opened to Collaterals of the original Vassal, the eldest Brother and his Descendents were preferred as the Heirs of
Line.

Line. 'Tis mighty plain, that these *feuda nova* could never become *feuda vetera* in any Course of Time, so as to exclude collateral Succession, or to bar Succession by Ascend. If Conquest go to the elder Brother, where the Acquirer a middle Brother, dies without Issue, no imaginable Reason can be given why it ought not to go in the same Channel, where the Acquirer leaves a Son who succeeds, and dies without Issue. In one Word, collateral Succession, and Succession by Ascend, ought to be convertible Terms; if in any one Case the eldest Brother is the lineal Heir, he ought to be considered as such in every Case of collateral Succession. But these Matters first took Footing in the Days of Ignorance, when the Conceptions of Mankind were gross and inaccurate. What it may be in other Countries I know not, but in the Practice of *Scotland* a very motely Scheme is established. We conceive nothing to be a *feudum novum*, but an immediate Acquisition. If it has once past by Succession, we understand it to be a *feudum anti-*

antiquum, or Heritage, not so indeed as to exclude collateral Succession, but so as to make the Succession for ever after to descend, and never to ascend. And we have been led into this Practice by an Error, apt, as above observed, to slip into all Sorts of Reasoning, which is that of mistaking Words for Things. Not attending to the Import of the Distinction betwixt *feudum antiquum et novum*, we took up with the Word, and deserted the Meaning, and so by Degrees came to conceive every old Feu to be *feudum antiquum*. And as there are no precise Boundaries betwixt what is old and what is new, we were forced, at last, to fix upon this Rule, That whatever has past by Succession, is to be understood a *feudum antiquum*. And having once introduced this arbitrary Distinction, in Place of the former, we unwarily applied to it these general Rules, which do apply only to the original Distinction betwixt *feudum antiquum et novum*. Nothing can be more gross: In Place of the proper Distinction betwixt *feudum antiquum et novum*, to substitute

stitute another of a quite different Kind, that has no Relation to it but the Name; and yet to mistake this new invented Distinction for the old, so as to give it the same Effect in Law, was certainly confounding Things in a strange Manner, and what could only happen in the Days of gross Ignorance. It is very true, that we went no further than to exclude the Privilege of Primogeniture, where a Feu had once been taken up by Succession. We never considered it to be a *feudum antiquum* in any such proper Sense, as to exclude collateral Succession. False Reasoning could scarce lead us so far. In judging of a nice Case, such as the Competition betwixt two Brothers, we might be led to substitute one Idea for another, the *feudum antiquum* for the *feudum novum*, especially if the Dispute happened about a Feu that was really old, or of a long standing. But, in a Dispute betwixt the Heir of the Vassal and the Superior, where the Question behoved to turn upon a Point of Fact, whether the Feu was granted after the Period that all Grants of this

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Kind

Kind were understood to go to Heirs whatsoever, there could be little Room for Mistake.

AND now to explain the Terms of *Heir of Conquest* and *Heir of Line*, let us suppose a *feudum novum* and a *feudum antiquum* properly so called, centered both in a middle Brother: The last, 'tis plain, cannot be, but by a Destination excluding the eldest Brother. Or let us suppose them both to be *feuda nova*, the one purchased by the second Brother himself, the other established in his Person by virtue of a Destination. Or, conformable to our present Practice, let the one be a Purchase, the other a Subject to which he derives Right, as representing a younger Brother. The eldest Brother will succeed in the Lands conquest by the middle Brother, the younger will succeed in the Lands that came to the middle Brother by Succession. And so it may often happen, that the same Person's Succession is split and divided betwixt two Male Representatives, the one named *the Heir of Line*,

Line, the other *the Heir of Conquest*. These Names are only used in the particular Case where both represent the same Person: In other Cases where there is no Occasion to make the Distinction, they pass under the common Appellation of *Heirs at Law*. For Example, an eldest Son, succeeding to Lands purchased by his Father, is not stiled *Heir of Conquest*, but *Heir at Law* or *of Line*. But with Regard to this, tho' the elder Brother is named *Heir of Conquest* in Opposition to the younger, who has the Name of *Heir of Line*, we must beware not to consider the Heir of Conquest as a limited Heir. 'Tis certain he is *eadem persona cum defuncto*, and as universal a Representative as the Heir of Line, properly so called, can be. And so says the Lord Stair, *Tit. (Heirs) § 10*. And he assigns a very ingenious Reason for giving to the younger Brother the Title of *Heir of Line*. "The
 " elder Brother (says he) is called *the Heir*
 " *of Conquest*, and the other retaineth the
 " common Name of *the Heir of Line*;
 which is saying, that the younger Brother is

allowed to retain a Name common to both, for want of another Term to distinguish him by.

TOUCHING Heirship Moveables, Tacks, Pensions, or other such Rights from which the Executor is excluded, and which, properly speaking, are not Land Rights, it is settled in Practice, that all of these go to the Heir of Line, and not to the Heir of Conquest. The Ground of this Practice may be readily gathered. Let us recal what is observed above, that the Right of Primogeniture, at first confined to military Feus, was gradually extended to take Place in the Succession of Males, whatever was the Nature of the Feu. But as there had been no Example of the Right of Primogeniture in the Succession of Females, our Forefathers did not think of carrying this Right beyond the Practice, and so confined it to the Male Succession. The same has happened here. The Privilege of Primogeniture had only taken Place

Place in Succession to Lands; and as there was no Example or Authority to determine the Point touching the Subjects now in Question, the natural Feelings prevailed, and the Propensity to pass downwards, or according to the Succession of Time,

PART

P A R T II.

TO complete this Subject, it will be necessary to take a View of the Transmission of Moveables from the Dead to the Living, and of the different Changes this Species of Succession has undergone in *Britain*.

HISTORIES in all Ages are full of the Encroachments of the *Roman* Clergy. There is no End of the Artifices used by them to usurp Power and Riches. Yet it appears strange, that by all the Historians, who write with great Spirit against them, one of their most successful Stratagems to ingross Money should be overlook'd. And yet this is so true, that we are entirely indebted to our Statute-book, for keeping in Memory one of the most notorious Pieces of Priest-craft ever was practis'd. Would any one believe, that there is a Country, and in *Europe* too, where the Clergy once gained such an Ascendant over the Minds of the People, as that the moveable Estate of every Man who died intestate was tamely suffer'd to
be

be swallowed up by that rapacious Body. Those who draw their Notions from the present Age, will scarce give Faith to the Story, that Superstition could ever be so prevalent, in any Age, as to produce a Law preferring the Bishop to the next of Kin. But let them suspend their Wonder for a Moment, till they learn the whole Extent of this Law. It did not stop at excluding the Relations of the Deceased, supposing them to be his Children. The Wife was excluded. Nay the Creditors were excluded. All was given to the Bishop *per averfamam*. Of Britain we are talking, and yet the shameless Rapacity was suffered here for Ages. We may believe such a monstrous Practice could not be established at once. It crept in by Degrees. The Foundation was laid in a Doctrine sedulously inculcated, That the moveable Effects of every dead Person, failing his own Appointment, ought to be laid out for promoting the Good of his Soul. This brought the Clergy into the Play. The *Ordinary* pretended at first but to give Advice, but this Advice, in Process of Time, gained

Authority, and became a Command. At last the Mask was thrown off, and the Ordinary, without Ceremony, took up the Possession, not deigning to account to any Mortal. Let us hear a grave Author * upon this Subject.

“ Originally the Goods of the Intestate passed by a Kind of Descent to the Children; afterwards by a *Saxon* Law, the Wife had her Part. In *Henry I's* Time the Clergy had gotten a Taste; for although the Wife and Children, or next of Kin had then the Possession, yet it was for the Good of the Soul of the Deceased; and the Ordinary had a directing Power therein, and was in the Nature of an Overseer, and somewhat more. Afterwards, in the Time of King *John* the Clergy had drawn Blood; for tho' the Possession was as formerly, yet the Dividend must be made in the View of the Church; and by this Means the Dividers were but mere Instruments, and the Right was vanished into the Clouds. But in *Henry III's* Time,

* *Bacon's Discourse of the Laws and Government of England, Part I. Cap. 66.*

"Time, the Clergy had not only gotten the
"Game, but gorged it: Both Right and Pos-
"session was now become theirs, and Wrong
"done to none but the Clouds."

AND so it came to be settled *, That if a
Man died intestate, neither his Wife, Chil-
dren, nor next of Kin, had Right to any
Share of his Estate, but the *Ordinary* was to
distribute it according to his Conscience, to
pious Uses; and sometimes the Wife and
Children might be amongst the Number of
those whom he appointed to receive it; but
however, the Law trusted him with the whole
Disposition.

THE first Statute that limited the Power
of the *Ordinary* was 13th, *Edward I. C. 19.*
by which it is enacted, "That where a Man
"dies intestate, and in Debt, and the Goods
"come to the *Ordinary* to be disposed, he
"shall satisfy the Debts so far as the Goods
Z "extend,

* New Abridgement of the Law, Tit. *Executors and Administrators*, P. 398.

“extend, in such Sort, as the Executors of
 “such Person should have done, in case he
 “had made a Will.” Afterwards the actual
 Possession was taken from the Ordinary, by
 obliging him to give a Deputation to *the next
 and most lawful Friends of the Intestate, for
 administering his Goods.* 3rd Edward III.
 Cap. 11. But this Statute proved but a weak
 Check to the Avarice of the Clergy. Means
 were fallen upon to elude it, by preferring
 such of the Intestate's Relations who were
 willing to offer the best Terms. This cor-
 rupt Practice was suffered to the Days of
 Henry VIII, when the Clergy losing Ground,
 the Statute 21. Henry VIII, Cap. 5. was e-
 nacted, bearing, “That in case any Person
 “die intestate, or the Executors refuse to
 “prove the Testament, the Ordinary shall
 “grant Administration to the Widow, or to
 “the next of Kin, or to both, taking Surety
 “for true Administration.”

THIS Statute, as it points out the particu-
 lar Persons who are intitled to have Letters
 of

of Administration, without leaving any Choice to the *Ordinary*, was certainly intended to cut him out of all Hope of making Gain of the Effects of Persons dying intestate. But the Church does not easily quit its Hold, Means were fallen upon to elude this Law also. Tho' the Possession by these Statutes, was wrested out of the Hands of the *Ordinary*, yet his Pretensions subsisted entire, of calling the Administrator to account, and obliging him or her to distribute the Effects to pious Uses. This was an admirable Engine in the Hands of a Churchman for squeezing Money. We may readily believe, that the Administrator who gave any considerable Share to the Bishop, to be laid out by him, without Doubt upon pious Uses, would not find much Difficulty in making his Accompt. It was probably this rank Abuse, which moved the Judges of *England* solemnly to resolve, That the *Ordinary*, after Administration granted by him, cannot compel the Administrator to make Distribution *. But at last the Right of

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* Last mentioned Author, P. 414.

the next of Kin was fully established by Statute 22 and 23. *Car. II. Cap. 10.* which enacts, That after Payment of Debts, Funerals and just Expences of all Sorts, the Surplusage shall be distributed as follows: " One
 " Third to the Wife of the Intestate, the Residue amongst the Children, and such as
 " legally represent them, if any of them be
 " dead. If there be no Children, nor legal
 " Representatives of them, one Moiety shall
 " be allotted to the Wife, the Residue equally to the next of Kin to the Intestate, in
 " equal Degree, and those who represent
 " them. But no Representation shall be admitted amongst Collaterals, after Brothers
 " and Sisters Children. And if there be no
 " Wife, all shall be distribute amongst the
 " Children; and if no Child, to the next of
 " Kin to the Intestate in equal Degree, and
 " their Representatives."

WE may reasonably conjecture, that the Church was equally successful in both Parts of the Island. We have undoubted Evidence that

that so early as the Days of our King *William*, which was in the twelfth Century, the *Ordinaries* or Bishops had wrought themselves into the Possession, and Administration of the moveable Effects of Persons dying intestate. Their Pretext must have been the same as in *England*, to distribute the Effects for pious Uses, in order to promote the Good of the Soul. Upon such a Foundation, there could be no Action at common Law to oblige the *Ordinary* to accompt, whether at the Instance of the Wife, Children, or Creditors. The Distribution was to be left to his Direction, and upon his Conscience. And what seems to put this past Doubt is, that it required a Statute here as well as in *England*, to oblige the *Ordinary* to do Justice even to Creditors, who are, of all certainly the most privileged. All this appears from the 22d Chapter of the Statutes of King *William*. The Words are, "After the Decease
" of any Man intestate, and owing Debts to
" Creditors, his Goods shall be disposed by
" his *Ordinary*, and the *Ordinary* shall be
" obliged

“ obliged to answer for the Debts, so far as the
“ Goods and Gear will extend, in the same
“ Manner as Executors named by the Defunct
“ are bound to do.” The Statute is full Evidence that in this early Age, the Bishops were taking Liberties contrary to Conscience, and the Trust reposed in them, even so far as to defraud the Intestate’s Creditors. We may believe the Cry was great before the Remedy was applied; and yet this did not open the Eyes of our Lawgivers. The Wife, Children, and nearest of Kin were left intirely at the Mercy of the Church. It is true, the Evil was the less grievous, that it was in every Man’s Power to prevent it, by making a Will. And it was probably urged in Favours of the Church, that it must be the presumed Intention of every Man who makes no Will, to leave the Management of his moveable Estate to the *Ordinary*.

BUT Cases occurring of Persons dying under Age, who are incapable of making a Testament, our People began to perceive the
Weak-

Weakness of the Church's Argument from Intention; for the Ordinary made no Difficulty of seizing the Possession in this Case also, tho' he had not even the Pretext of an implied Intention. This Practice therefore was thought a Grievance, and a Statute was made to redress it. The Preamble of the Act 120. P. 1540. is, " That whereas
 " Persons often dying young, who cannot
 " make a Testament, the Executor named
 " by the Ordinary does notwithstanding in-
 " tromit with the whole Goods, and with-
 " draw the same from the nearest of Kin,
 " who should have the same by Law :"
 Therefore enacted, " That when any Per-
 " son dies who cannot make a Testament,
 " their next of Kin shall have their Goods,
 " without Prejudice to the Ordinary's Claim
 " of a Quote."

THIS Statute laid the Foundation of a legal Claim, which was soon thereafter enlarged. One Article of the Instructions 1563, given to the Commissaries is, " That if one die
 " in-

“intestate, or his Executor nominate refuse to
 “accept of the Office, the Commissaries must
 “give the Office to the nearest of Kin, be-
 “ing willing to find Caution.” This is co-
 pied from the above mentioned Statute of
Henry VIII. enacted a few Years before.
 But the Regulation had still a better Effect in
Scotland than in *England*. It required a Sta-
 tute there to complete the Right of the next
 of Kin, and to protect them from the En-
 croachments of the Clergy. But in *Scotland*
 the Bishops, immediately upon the Reforma-
 tion, having lost all Authority, the next of
 Kin getting Letters of Administration from
 the Commissaries, came of Course to retain
 the Effects, without having any to accompt
 to, save to those who had a natural Right.
 The Bishop had lost his Claim, and the Com-
 missaries never had any.

I OBSERVE, that in the above Article of
 the Instructions 1563, no Mention is made of
 the Relict, tho’ her Interest is expressly taken
 Care of in the *English* Statute, whence the
 Ar-

Article is copied. This could not have happened by Inadvertency. My Conjecture is, that our Judges have taken the honest Liberty to sustain Action against the *Ordinaries*, to the Relict for her Third, and to the Children for their Legitim, in Imitation of King *William's* Statute affording Action to Creditors. If a legal Claim was afforded to the Wife and Children by the Practice of the Courts of Law, it was unnecessary to make any further Provision for them in the Instructions 1563; and so the Article is confined to the next of Kin, who formerly had no Claim. And it was extreme natural for our Judges to take this Liberty, considering that the Wife and Children, by the common Law of the Land, had an unexceptionable Claim against the Executor nominate. And it might well be thought strange and unaccountable, that a Man should have it in his Power to defraud his Wife and Children of their just Claim, by forbearing to make a Will, or that the *Ordinary* should not be liable as well as the Executor nominate.

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Thus the Right of the next of Kin is established, where the Predecessor dies intestate. But where a Testament is made, which is the more frequent Case, they were left without Remedy, unless Provision was made for them in the Testament. They had no Right hitherto established in them, save the Privilege of being preferred to all others in the Office of Executry. But this Privilege could not take Place where an Executor was named by the Deceased, nor was any Action competent at common Law to oblige the Executor nominate to account to them. 'Twas understood to be the Will of the Deceased, that the Distribution should be left to the Discretion of the Executor, where the contrary was not expressed; just as formerly it was understood to be his Will to leave all to the Discretion of the Ordinary where he died intestate. And thus it happened, that the very Nomination intituled the Executor to retain to himself the free Moveables, even where he was not named universal or residuary Legatar. This was remedied by the Act 14. P. 16 17.

which gives to the next of Kin the like Action against the Executor nominate to accompt for the Effects confirmed, that was before competent against him at the Instance of the Wife and Children.

OUR Law then with Regard to the Interest of the next of Kin, stands thus. Where the Predecessor dies intestate, they are privileged to be Executors, or Administrators without accompt, and of consequence to retain the free Effects. Where he makes a Will, they are intitled to call the Executor to accompt. But where by Oversight or Accident they happen not to apply, *debito tempore*, to be confirmed Executor, so that a Creditor gets the Office, or perhaps the Procurator-fiscal, I see no Remedy. There is certainly no Action given in this Case to the next of Kin against the Administrator or Executor-dative to accompt, as there is in the Case of an Executor nominate. Nor is there *par ratio*, as it must be the Fault of the next of Kin, if they are cut out of their Right where the Predecessor

dies intestate: And the Instructions to the Commissaries 1666, do take it for granted, that no such Action is competent; for it obliges the Procurator-fiscal, who failing others, is allowed to confirm, to accompt to the Archbishop or Bishop, he having three Shillings for every Pound he brings in and makes Payment of. Yet where so many Steps are taken to found the next of Kin in a legal Claim, we are naturally led to complete the Scheme, by giving them a Right in every Case. And it is extreme likely, that if such a Question come before the Court of Session, the Judges will sustain a Claim at the Instance of the next of Kin against an Executor Creditor, and *multo magis* against the Procurator-fiscal confirming. And what leads me to think so, is the Act of Sederunt 14th November 1679, in which it is taken for granted, that an Executor Creditor is liable to accompt, not only to the Relict and Children, but to the next of Kin.

FROM this short History of the Transmission of Moveables from the Dead to the Living,

ving, it will be evident that there is no such Thing, properly speaking, in the Law of this Island, as an Heir *in mobilibus*. If a Will is made, the Form of it is to name an Executor, or Trustee, to distribute the Effects, according to the Will of the Testator, if exprest; and if not exprest, according to established Rules. If the Person dies intestate, the whole moveable Effects are understood to be *eo ipso* vested in the *Ordinary*, or in Place of him, the Commissaries in *Scotland*, not in the Quality of Heirs, but as Trustees to distribute the Effects to pious Uses. Accordingly no Person is legally intitled to take Possession of an Intestate's Effects, otherways than by an exprest Warrant from the *Ordinary* or Commissaries. And after the Restoration, the Bishops in *Scotland* took great Care to preserve their Right. They had Spies in all Corners, and no sooner was a Man laid in his Grave, than they thundered out all the Artillery of the Law, to force his Relations to apply for Letters of Administration. But this Grievance, among others, was redressed after the Revolution. What was suffered

suffered with Impatience under the Jurisdiction of Bishops, was not at all to be endured under the Jurisdiction of their Shadow, the Commissaries. Accordingly a Statute was made, Act 26, P. 1690, discharging such Prosecutions in Time coming, " That no Person " shall be bound to give up Inventory of a De- " funct's Goods, and that there shall be no " Confirmation, unless at the Instance of the " Relict, Children, nearest of Kin, or Creditors." It was the Intent of our Legislature, by this Statute, tho' not said directly, to transfer to the Children or next of Kin, the Property of the Moveables which belonged to the Deceased, without requiring any other Act or Solemnity, but barely the apprehending of Possession. This will be obvious, from considering that, by the common Law, there is no other Form known, of acquiring the Property of Moveables, which belonged to a deceased Person, but by Warrant of the *Ordinary* or Commissaries. And when this Form is dispensed with, without substituting any other, Possession alone must have the Effect. It is true, Con-

Confirmation is not altogether laid aside; it is still of Use to preserve the Intromitter from being liable to Creditors beyond the Value of the Subject. But if the Children or nearest of Kin are willing to take their Hazard, they may safely enter into Possession, without applying for a Title. And thus, after much wandering, the Transmission of Moveables from the Dead to the Living is brought back to its natural Channel, and reduced to the simplest Form.

It remains only to be observed, That tho' in England the *jus representationis* is introduced to a certain Extent, in the Succession of Moveables *ab intestato*, we have not thought proper to follow this Practice. We adhere strictly to the Law of Nature in moveable Succession, by preferring the next in Blood, without Distinction betwixt Male and Female, and without regard to the Privilege of Primogeniture.

A P P E N D I X
TOUCHING
The HEREDITARY *and* INDEFEASIBLE
RIGHT *of* KINGS.

THE hereditary-indefeasible Right of Kings, and Passive-obedience and Non-resistance its genuine Offspring, are Doctrines which of late have made a great Noise in *Europe*, and particularly in this Island. Some Reflections upon this Subject, suggested by the present unhappy Times, will make a proper Appendix to the above Essay.

WHEN we consider Man, abstracted from all positive Engagements, we find nothing in his Nature, nor in his Situation, to subject him to the Power of any, his Creator, and his Parents excepted. The parental Power is at an End, when Children are grown up, and can provide for themselves. At any Rate the parental Power cannot subsist longer than the Life of the Parents; for it is not a Matter of Property to be transmitted by Succession, since
it

it depends upon personal Circumstances. And supposing it a Subject to be taken by Succession, it must descend to all the Children equally, at least to all the Sons equally; for Primogeniture, 'tis certain, is not a Privilege of the Law of Nature, but only of the Feudal Law. Hence it is a Principle embraced by the gravest Writers, that all Mankind are born free, and independent of one another.

MAN indeed is fitted for Society. His Wants prompt him to it, and his Inclinations render it agreeable. Accordingly we find Mankind almost every where parcelled out into Societies, which have been originally formed by accidental Circumstances, more or less extensive. A Society of any Extent cannot be without Government. The Members must have Laws to determine their Differences, and they must have Rulers to put their Laws in Execution. At the same Time, we find the Constitutions of different States, with regard to Government, almost as various, as are the

Sentiments of Men concerning it: So that tho' Government be necessary to the Well-being of Society, yet from this Circumstance alone, were we to look no further back, we may conclude no particular Form to be necessary, but that all are the Effect of Choice, or perhaps in some Measure of Accident.

LET us trace this Matter further, because it is of Importance. Man is a shy Animal, and in his original State, rather averse to Society. In that State his Wants are few, and easily supplied; therefore we may readily conclude, that while Acorns were the Food of Man, and Water his Drink, there was neither Use nor Appetite for Society. Accordingly we find Mankind originally in every Corner of the Earth living in scattered Habitations, with little Intercourse, except among the Members of the same Family. The Culture of Corn laid the Foundation of a more extensive Intercourse, because thereby mutual Assistance became necessary. When Arts were invented, and Industry increased, it was found

found convenient to herd together in Towns and Villages. From this closer Connection one Evil sprung, Opposition of Interests, formerly rare ; which at first was the Occasion of Quarrels and Bloodshed, and afterwards of frequent Appeals to Men of Weight and Probity. In Time the Necessity of fixed Judges to determine Differences being discovered, the Election of these Judges, which could not otherways be than popular, was the first Step to Government. The chief Magistrate therefore was originally no more but the chief Judge, whose Powers were gradually extended, as Cases occurred, which required the Interposition of a Superior or Governor. War introduced Slavery, as it subjected those taken in Battle to the arbitrary Will of their Conquerors; and absolute Power was too desirable an Acquisition, to be confined to private Persons. The chief Magistrate, however repugnant it is to the Nature of his Office, did often grasp at it: And History informs us, That the chief Magistrate, in different Societies, has been often but too successful.

In a Word, absolute Independence and absolute Power are the two Extremes; and the latter, at least so far as concern Sovereignty, could never have been introduced, but by passing through all the intermediate Degrees.

GOVERNMENT therefore is one of the Arts which Necessity has suggested, which Time and Experience have ripened, and which must be perpetually susceptible of further Improvements. For Government, like all other Arts, being invented for the Good of Mankind, it must be the Privilege of every Society to improve upon it, as well as upon Manufactures or Husbandry. No particular Form therefore can be necessary, as no particular Form is preferable to another, unless so far as it has a greater Tendency to promote its End, the Good of the Society. Comparing Democracy, Aristocracy and Monarchy together, this is their common Standard.

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THERE is a People inhabiting the Earth, who are not left to the Choice of their Governors, but are by Nature subjected to Monarchy. In every Society there is a Royal Family, of a different Species from the other Members. Every Monarch is born with Marks of Royalty, of a peculiar Shape, and with superior Beauty. We may suppose, that the Excellencies of the Mind are not inferior to those of the Body; and no Wonder when such is the Case, that perfect Obedience is given through all the State, and that the Monarch's Will is their only Law. Here the Parts are justly distributed, the Sovereign framed for Command, as the Subjects for Obedience, each in their several Capacities equally contributing to the only End of Government, the Well-being of the Society. In this Community there can be no stretching of Prerogative on the one Hand, no Resistance nor even Murmurs on the other. The Monarch taught by Nature, that the Sovereign Power is a Trust which ought not to be abused, has no Desire but to promote the publick Welfare. The
People

People taught by Nature, that passive Obedience and Non-resistance are the Means to promote their Happiness, implicitly submit themselves to their Monarch's Will.

WERE Mankind so framed, for of Insects we have been speaking, these Gentlemen would have Reason on their Side, who declare so strongly for indefeasible-hereditary Right, and the reciprocal Duty of passive Obedience and Non-resistance: Were our Royal Family, like that of the Bees, distinguished from the Mass of the People by superior Excellencies, whether of the Mind or Body, were they unerringly prompted by Nature to exercise their Power for the Welfare of the Society, blind Obedience to their Will would be a Virtue. But when we trust with sovereign Power one of the common Stamp of Mankind, who has by Nature no Marks of Royalty, and who perhaps by Nature is not fitted for Command, the Absurdity is great, to maintain, That this Person ought to be under no Controul, and that we ought to

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continue to trust him, after repeated Instances of his betraying the Trust reposed in him.

I HAVE no Occasion to consider whether Conquest be a good Title by the Law of Nature, to acquire the absolute Dominion of a State, as in *Turky*, where the Grand Signior is supposed to be the Lord of the Manor, and all the People his Slaves. This is not Government, the Characteristic of which is, Trust reposed in one for the Good of the whole. It is like a private Estate, which may be disposed of by the Proprietor without Controul, and applied for his own Purposes. It cannot be pretended that the King of *Britain* has his Right by Conquest; and therefore no Support can be brought to the Argument from this Quarter.

THE Scheme, it must be yielded, is so far consistent, that if we suppose the King's Right to be indefeasible, and that he cannot be deprived of his Authority, however much his Measures swerve from the Rules of good Government,

vernment, it must follow, that the People are tied to passive Obedience and Non-resistance, as there is no *Medium* betwixt Resistance and Obedience. But where is the Foundation of the indefeasible Right of the King, more than of any other Officer of the State? Does it lie in the Name? One should scarce think so, when the Name is indifferently applied to Governors who have very little Power, as well as to those whose Power is the most extensive. It cannot lie in the Nature of the Office, which being a Trust, is undoubtedly forfeitable upon Mal-administration. It will perhaps be said to lie in the Constitution of our Government. So far from it, that no Man is bound to obey the King's Commands, unless delivered in a certain Form prescribed by Law. And even in *France*, supposing it an absolute Monarchy, without any constitutional Check upon the King's Actions, the King's Power is notwithstanding limited. There cannot be such a Thing in Nature, as for a People voluntarily to surrender their Liberties to the arbitrary

Will

Will of any Man. The Act would be void as inconsistent with the great Law of Nature, *salus populi suprema lex.*

BUT the Favourers of this Doctrine, when beat out of these Entrenchments, have a Retreat, which they suppose impregnable. They allow at last that the King may do wrong, by betraying the Trust reposed in him. But then they maintain, that a King having no Superior on Earth, can have no proper Judge of his Actions but God alone, from whom his Power flows; and therefore is accountable to the Almighty only. This is a Fortress built upon Sand. All Power no doubt is from God, natural and legal; for he is the Creator and Upholder of all Things. But it follows from this, instead of being contradictory to it, that every Sort of Power is limited by the Opposition of other Powers, natural or legal, which are equally from God with the Power resisted. Perhaps they mean that every King has his Commission from the Almighty, and not from the People. Hi-

story alone may suffice to inform us, that this cannot be, when there have existed so many Kings unworthy of Command. But supposing the Fact, it does not follow, that this Commission is unlimited. On the contrary, it must be limited; for who can patronize so impious a Doctrine as that God should give a direct Commission to any Being to plague and persecute Mankind, unless for their Sins? The Voice of Nature is the Voice of God; and it is a fixed Principle in the Law of Nature, that where there is no common Judge to appeal to, the Party injured may do himself Justice. The Laws are superior to the King, and these he must be judged by. And supposing an absolute Government in the strictest Sense, where the King's Will is Law, yet there is always one Law above him. If his Actions generally tend to Destruction, instead of Government, the People, who have no Judge to appeal to, may lawfully do themselves Right. *Salus populi est suprema lex.*

BUT after all, where is the Necessity of God's extraordinary Interposition, by granting his immediate Commission to Kings, when in other Matters he chuses to govern the World by second Causes and ordinary Means? Why should we suppose, that Mankind are deprived of their natural Privilege of chusing their first Magistrate, more than of chusing those that are subordinate? Where is this Commission recorded? Is it given to all Rulers who have the Name of *King*, or are some Nations peculiarly honoured? Is it given to all Sovereigns in general, whether honoured with the Name of *King* or not? Had all the Crown-Vassals in *France*, Dukes, Earls, Barons, this Commission, who usurped, and, for many Ages, possessed a Sort of Sovereignty within their own Territories? These are puzzling Questions, and it would require an express Revelation to put an End to the Doubts that arise from them. The legislative Power one should imagine is of a superior Rank to that of the King, because it gives Laws to the King; yet no peculiar

Interposition of Providence is pretended in its Behalf. This Body is left to be modelled by Choice or by Accident. The Government of the World is after this Manner carried on; and yet nothing happens, we may presume, contradictory to the original Plan of Providence: Why then a peculiar Providence in Behalf of Kings, or an immediate Revelation, when there appears to be no Necessity? We cannot, without Impiety, admit of the Supposition, when, so far as weak Man can conjecture about the Operations of the Almighty, he never interposes by extraordinary Means, unless where the ordinary Dispositions of Providence prove insufficient to answer his Purposes; We may therefore conclude, with the highest Degree of Assurance, that Kings have no other Commission from God, but what every Magistrate has, supreme and subordinate, who is legally elected according to the standing Laws of the Society to which he belongs.

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BUT Doubts and Difficulties multiply upon us. Were all the Nations pointed out by an express Revelation, who, like the *Jews* of old, are to be governed by Magistrates of God's express Appointment; were all the Families pointed out who are to bear his Commission, the Revelation would still be imperfect. It is not enough to point out the Family; the Rules of Succession must also be ascertained, that there be no Dispute about the particular Persons who are to enjoy this Hereditary-indefeasible Right. Here, without a new Revelation, we are left in a great Measure at an Uncertainty; for are we to follow the Rules of *England* or *France*? Are we to be guided by the Law as at present established, or as it was three Centuries ago? Whatever Rules are followed, we must be sensible they are in a great Measure arbitrary, the Offspring of Accident, or of the slenderest Feelings of the Imagination, and established by Custom only. Has not this a strong Appearance of leaving to every Nation the Choice of their own chief Magistrates? Kings were at first
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generally chosen for Life. It crept into Practice to make all publick Offices hereditary; and so the sovereign Power has generally come to be hereditary, partly from the Bent of the People, and partly to avoid the Inconveniencies which elective Monarchy is subjected to. But after what Manner is this hereditary Right of Kings carried on? Not by any universal Law, expressly revealed or wrought into the Nature of Man; so far from it, that the Rules of Succession are different in every different Country, established by Custom alone, or, in other Words, by the Consent of the People. In *France*, for Example, the Females are totally excluded. Have Females by the Appointment of the Almighty this indefeasible Right of Succession? If they have, *France* for many Ages have been in a damnable Error. If not, the Load of the Guilt must ly upon *England*, and upon many other Countries who admit of Female Succession. In my Apprehension, the Consequence cannot be evaded, otherways than by fairly acknowledging, that God in this Matter, as well

well as in others, works by second Causes without any direct Interposition, leaving every Nation to be governed by Laws of their own Appointment. And indeed nothing looks liker a Contradiction, than to suppose, that hereditary Monarchy is the Appointment of the Almighty, and that he has bestowed upon every Heir an indefeasible Right, not to be dispensed with upon any Occasion whatever, without pointing out, by infallible Marks, the Persons who are to enjoy this extraordinary Privilege; for this would be to command us, under the Pain of Damnation, to give entire Submission to Persons, as Rulers appointed by him, without revealing who these Persons are,

ANOTHER Inference may be drawn from the Doubtfulness of the Law of Succession. It is a self-evident Proposition, that no Right can be stronger, than the Title upon which it is founded. No Title is more slender, in most Instances, than that of Succession. How then can it be maintained, that the hereditary Right of Kings is indefeasible, when the Title
upon

upon which the Right is founded is so weak and so arbitrary. I think we may with Certainty conclude, that such a Right must, upon every Occasion, give Place to the primary Rights of Nature, such as tend to our Preservation and Well-being: And therefore that any particular Heir may be safely set aside, when he becomes dangerous to the Society. For this is assuredly the Voice of God, That in every Conflict the weaker Right must yield to the stronger. Nay, we may go one Step further, that if the Good of the Society can be more promoted by a different form of Government, hereditary Right may be laid aside altogether without any Crime; since the Good of the Society is an Object of much greater Importance than the Right of any particular Family can be.

TOUCHING the Family of *Stewart*, no Right has less the Air of Divine Authority than what they had to the Crown of *Britain*. To look no further back than to the Competition betwixt *Bruce* and *Baliol*, which, in these Days,

Days, appeared, and truly, was an intricate Affair: Was *Baliol* a King by Divine Appointment, when he was acknowledged and submitted to, in consequence of an Award given by *Edward* of *England*, who plainly manifested, by the whole Course of his Proceedings, that he was more swayed by political Considerations, than by Justice and Equity? Unhappy is the Condition of that People, who, under the Pain of Damnation, must yield passive Obedience and Non-resistance to a Monarch, and yet have no better Authority to direct their Duty, than such an Award. It will be said, that the Merits of the Cause were with *Baliol*. But how the Patrons of the Divine Right of Kings should come to a Certainty in this Matter, I'm at a Loss to understand. For not to mention the Pretensions of his Competitor *Bruce*, it is perhaps not extremely clear, that a Female has any Divine Right to a Crown; at least, there is no Instance of this amongst the *Jews*. And if Females are admitted, I cannot see why the Kingdom ought not to be split amongst Fe-

male Heirs, as well as a private Estate. If Right to a Crown be considered as a Matter of Property, there certainly ought to be no Difference. But laying aside all Difficulties, and supposing *Baliol's* Right of Primogeniture to be invincibly good, 'tis plain *Robert Bruce* could have no Divine Right, nor can the *Stewarts* have a Divine Right who derive their Right from him. It is but a mean Subterfuge, That none of *Baliol's* Race appear to claim the Crown. Will it be said, that this Nation continued in an obstinate Course of Rebellion against the King of Heaven, so long as any of *Baliol's* Race existed? How do we know they do not at present exist? It is our indispenfible Duty to search for the King whom God has given us, thro' every Corner of the Earth. 'Tis equally our Duty to refuse our Obedience to an Usurper; and he must be so, who has not a hereditary Right, and consequently, is not of God's Appointment. Let us keep in View that Prescription, positive or negative, can avail nothing, which

which has no other Foundation but universal Consent, implied from a long Acquiescence.

THE Asserters of this Divine Right dare not yield, that *Baliol* forfeited the Crown of *Scotland*, by acknowledging himself to be the King of *England*'s Vassal; for this would be justifying the late Revolution in every Point. Making an independent Kingdom a Fief of another Sovereignty, is not more subversive of the Constitution, than the Measures are, which were pursued by *James VII.* during the whole Course of his Reign. And if the People of *Scotland* could lawfully judge, that *Baliol* had subverted the Constitution, and upon that Judgment transfer the Crown to another; the People of *Britain* had the same Title to give Judgment against *James VII.* and to declare that he had forfeited the Crown.

WITH regard to *England*, the Pretext of a Divine Right is still more lame, if possible. *William* the Conqueror was a Bastard, and could have no Divine Right to the Dukedom

of *Normandy*; nor did he himself pretend any other Right to the Crown of *England*, than by the Testament of *Edward* the Confessor. But supposing him to have conquered *England*, which will not be readily yielded, he certainly did not conquer his *Norman* Subjects who came over with him to *England*, and from whom, for ought we know, a great Part of the Nation are descended. The *Stewarts* therefore who have no other Claim to the Crown of *England*, but by a Female Connection with the Race of *William* the Conqueror, cannot, with any Shadow of Reason, insist upon their beloved Doctrine of a Divine Right, so far as concerns the *English*, who are of *Norman* Extraction.

UPON the whole, supposing the hereditary Right of Kings to be the Appointment of God, indefeasible and indispensable, the following Points ought to be ascertained; 1^{mo}, Whether this Law be universal, to take Place over the whole Earth, or if it be limited to certain Nations, and what these Nations are.

2^{do},

2^{do}, To what particular Families does this Divine Right belong, which are thus made superior to the rest of Mankind. 3^{to}, The Rules of Succession, which concern these particular Families, ought to be distinct and perspicuous, so as to procure a perfect Agreement amongst Mankind, as about the primary Laws of Nature. 4^{to}, These Rules ought to be wrought into our Nature, and the Transgression of them attended with the strongest Sense of Immorality, like Treachery or Murder. Were these Points thoroughly cleared, the Scheme might be consistent. But as it stands, it is attended with Doubts and Darknes, to lead every honest Heart who espouses it, into endless Perplexities.

MODERN Histories are full of the Evils occasioned by disputed Successions; they are still fuller of the Evils occasioned by Contests about the King's Prerogative. There can be no Moderation in such Controversies, where God Almighty is made a Party, and every Person called *impious* who takes the opposite

posite Side. Hereby it comes, that this Doctrine of hereditary indefeasible Right in Kings seldom fails to break the Peace of Society, to foster inveterate Enmities, and to be the Source of endless Wars; of which, were there no other Evidence, the present Times afford a deplorable Instance. So that, if we are to give any Parent to this Doctrine, other than blind Enthusiasm, we can never ascribe it to a good Being. And indeed if there is an invisible Power, a greater Enemy to Mankind than another, he could not possibly instill into us a more poisonous Principle. Plague and Famine are nothing to it.

BUT, tho' I have been deservedly severe upon the Doctrine, I would not be understood to pass the same Censure upon its Votaries. I am sensible the further removed a Tenet is from Truth, the Difficulty of Conversion, is proportionally great. 'Tis like Love bestowed upon an ugly Woman, which is observed to be ever without Bounds. The *Jacobites*, such as are not of desperate Fortunes, certainly deserve
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Compassion, even while they are laying waste their Country by intestine Commotions. They can have no other Motive but Principle, when they venture their Lives and Fortunes in the Service of their Idol Prince; as their Prospect of Success can never balance the Hazard. What Pity it is they were not employed in a better Cause. But if nothing else will open their Eyes, ought it not to have some Weight, that there is nothing more repugnant to the Laws which must govern all Societies, than for any single Man, or Set of Men, to force their Opinion upon the Majority. How would they relish the Behaviour of a Member of their own Parliament, who should endeavour by Force of Arms to oblige the whole Body to submit to his Sentiment? Or how would they relish it, that a Body of Men should rise in Arms upon no better Pretext, than that of doing right to a Friend whom they suppose to be unjustly condemned by the whole Body of Judges? Is it not an Excuse commonly given by *Banditti*, for robbing on the Highway, that they

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are but making Reprisals upon Account of Goods unjustly wrested from them by Authority of Law? Yet this is precisely the present Case. The late King *James* was set aside by the sovereign Authority of the Nation, that is, by the Act of the Majority, who, from the very Nature of Society, must be the ultimate Judges, in all Matters which concern their Preservation and Well-being. Perhaps he was unjustly condemned. Be it so for Argument's Sake. But an ultimate Judgment must lie somewhere, without further Appeal. It must be a fundamental Law in all Societies to acquiesce in this ultimate Judgment, right or wrong, without which Concord cannot be preserved, but for a Moment. No honest Remedy after this can remain, but to desert the Society and to join some other, where the Rules of Justice are supposed to be better observed. Can it be thought that the Right of any Man in a Society, supposing him to be a chief Magistrate, trusted with the greatest Powers, is superior to the fundamental Laws of the Society, whence

he derives this Right? It is an Absurdity, the same, as, that a Part is greater than the whole. It were to be wished, that Gentlemen would seriously consider this Matter, who are so strenuous for the Claim of an abdicated King, and who would embroil Heaven and Earth to compass the Restoration of the Family. And would they but allow themselves to think, with any Degree of Coolness, they would soon be convinced, That the Peace of Society is an Object of greater Importance than the Right of any particular Man can be, supposing him to be descended from a thousand Kings.

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NOTE

NOTE of some Things omitted in the Essay
upon Honour and Dignity.

THERE appears upon the Records a
Form of creating Peers, different from
any above mentioned. One remarkable In-
stance, is an Act of the 7th Parliament, *James*
VI. anno 1581, bearing, That the Lands of
Doun, &c. were feued by *Queen Mary* to *Sir*
James Stewart of Doun Knight, his Heirs, &c.
subsuming, that the said *Sir James* being de-
scended of the Royal Blood, "therefore his
" Highness, with Advice of his three Estates,
" erects, creates, unites, annexes and incorpo-
" rates all and sundry the foresaid Lands, Of-
" fices, and other Particulars above written,
" in an *Lordship*, to be called in all Time
" coming the *Lordship of Doun*, decerning
" and ordaining the said *Sir James*, his Heirs
" and Successors, specified in the Infeftment,
" in all Time coming, to be called and intitu-
" led *Lords of Doun*, who shall have the Ho-
" nour, Dignity, Place and Preheminence of
" a Lord of our sovereign Lord's Parliament,
" in

in all Parliaments, Assemblies, and other Conventions, with his Arms, offering there- to; and giving unto him all Honours, Dignities and Preheminencies which pertained, or of Right and Consuetude ought to pertain, to a Lord of Parliament.

This Form, it is presumed, has been introduced, in Imitation of the old Form of creating an Earl, by erecting his Lands into a County. And hence the Design and Use of erecting Lands into a *Dominium* or Lordship. Patents in the above Form are doubtless of the King's Grant, as well as other Patents. This, in favour of Lord *Down*, has been done in Parliament for the greater Solemnity, the King being at that Time under Age.



